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No. 570

TRANSCRIPT OF RECORD.

FILED
OCT 23 1957
JOHN T. FEY, Clerk

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,071

TROPICAL MARINE PRODUCTS, INC.,
Appellant,

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

U. S. COURT OF APPEALS

(ORIGINAL RECORD RECEIVED MAR. 30/56.)

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On February 18, 1955 COMPLAINT together with Exhibit attached thereto was filed in the words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION.

No. 6078-M-Civil.

TROPICAL MARINE PRODUCTS, INC.,
Plaintiff,

against

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,
Defendant.

Plaintiff, by its attorneys Fowler, White, Gillen, Yancey & Humkey, complaining of the defendant herein, alleges upon information and belief as follows:

First: That at all times hereinafter mentioned, plaintiff, Tropical Marine Products, Inc., was and still is a corporation duly organized and existing under the laws of the State of Florida and was at all material times the owner of a certain motor vessel, named the Sea Pak.

Second: That at all times hereinafter mentioned, the defendant was and now is an insurance underwriter chartered under the Laws of the State of Pennsylvania and engaged in the business of insuring marine risks in the State of New York.

Third: That the jurisdiction of this Court is based upon the diversity of citizenship of the parties hereto and the amount in controversy, exclusive of interests and costs, being in excess of the sum of $3,000.00.

Fourth: That on or about August 13, 1953 one, T. A. Barba and the defendant entered into a contract of insurance a copy of which is annexed hereto, incorporated herein and marked Exhibit "A", wherein and whereby the defendant, in consideration of certain premiums paid by the said T. A. Barba, did insure the latter in accordance with the terms of the said contract against, among other losses, total loss of the motor vessel Sea Pak in the amount of $30,000.00. Thereafter the said T. A. Barba duly sold and conveyed to plaintiff all his right, title and interests in and to the motor vessel Sea Pak hereinbefore described and thereupon, with the consent of the defendant, the aforesaid contract of insurance was indorsed on November 10, 1953 to the plaintiff herein. A copy of the indorsement is attached and made a part of Exhibit "A."

Fifth: That on or about August 13, 1954, and while the said contract of insurance was in full force and effect, and motor vessel Sea Pak was caused to founder off Long Cay on the Caicos Banks in the Turks and Caicos Islands by perils of the seas latent defects in the machinery, and/or other perils insured against, and became a total loss within the meaning of the contract of insurance.

Sixth: That the plaintiff promptly gave notice of the loss to the defendant together with proof of said loss in accordance with the terms and conditions of

said contract of insurance and the plaintiff has fully and duly performed all conditions of said contract on its part to be performed.

Seventh: That demand has been duly made upon the defendant for the payment of said sum of $30,-000.00 which became due to the plaintiff under the terms of said contract and no part thereof has been paid by the defendant.

Eighth: The defendant having failed to pay the plaintiff the sum demanded as hereinabove alleged, it has become necessary for the plaintiff to employ counsel to prosecute its claim and plaintiff has employed the law firm of Fowler, White, Gillen, Yancey and Humkey to do so, and has obligated itself to pay the said attorneys' fee for their services in the premises.

Wherefore, Plaintiff demands judgment against the defendant for the sum of $30,000.00 with interest thereon from August 13, 1954 together with costs of this action and attorneys' fees.

FOWLER, WHITE, GILLEN,
YANCEY & HUMKEY,
By (S.) HENRY BURNETT,
Attorneys for Plaintiff.

Note

Pages 4-10 are
on Card 2.

On March 10, 1955 ANSWER of Defendant was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant, by and through its undersigned Attorneys, and for answer to the complaint filed herein, alleges:

1. It admits the allegations contained in paragraphs First, Second, Third and Fourth.

2. It denies the allegations contained in paragraph Five.

3. In answering paragraph Six, it admits that it was given notice of the loss in accordance with the terms of the policy of insurance but denies the other allegations of paragraph Six.

4. It admits the allegations of paragraph Seven except that it denies that the said sum is due to the Plaintiff under the terms of the policy.

5. It denies the allegations contained in paragraph Eight.

SMATHERS, THOMPSON,
MAXWELL & DYER,
By (S.) DOUGLAS BATCHELOR,
Attorneys for Defendant,
Birmingham Fire Insurance
Company of Pennsylvania.

I Hereby Certify that a copy of the foregoing Answer was mailed to Fowler, White, Gillen, Yancey

& Humkey, Attorneys for Plaintiff, 507 Biscayne Building, Miami, Florida, this 10th day of March, 1955.

(S.) DOUGLAS BATCHELOR.

On February 18, 1955 SUMMONS was issued and on March 11, 1955 was returned together with the Marshal's return in the words and figures as follows:

United States District Court for the Southern District of Florida, Miami Division.

Civil Action File No. 6078-M-Civil.

United States Marshal Received Feb. 18, 1955, Miami, Fla.

Received at Jacksonville Mar 9 1955, U. S. Marshal, Sou. Dist. of Fla.

Tropical Marine Products, Inc., Plaintiff,

v.

Birmingham Fire Insurance Company of Pennsylvania. Serve: John E. McKinley, General Manager of Birmingham Fire Insurance Company of Pennsylvania, 921 South Miami Avenue, Miami, Florida, Defendant.

To the above Defendant:

You are hereby summoned and required to serve upon Fowler, White, Gillen, Yancey & Humkey, plaintiff's attorney, whose address 507 Biscayne Building, Miami, Florida, an answer to the com-

plaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JULIAN A. BLAKE,
Clerk of Court,
(S.) ANNA M. FITZSIMMONS,
(Seal) Deputy Clerk.
(Seal of Court)

Date: Feb. 18, 1955.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

On April 12, 1955 INTERROGATORIES to Plaintiff was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant, by and through its undersigned Attorneys, and serve upon the Plaintiff the following interrogatories to be answered under oath by an officer of the Plaintiff corporation:

1. State the peril or perils of the sea that caused the "Sea Pak" to flounder.

2. State the latent defects in the machinery that caused the "Sea Pak" to founder.

3. State what other perils insured against caused the "Sea Pak" to founder.

SMATHERS, THOMPSON,
MAXWELL & DYER,
By (S.) Douglas D. Batchelor,
Attorneys for Defendant,
Birmingham Fire Insurance
Company of Pennsylvania.

I hereby certify that a copy of the foregoing Interrogatories was mailed to Fowler, White, Gillen, Yancey & Humkey, Attorneys for Plaintiff, 507 Biscayne Building, Miami, Florida, this 11 day of April, 1955.

(S.) DOUGLAS D. BATCHELOR.

On May 20, 1955 AFFIDAVIT of Stuart N. Willner, IN SUPPORT OF APPLICATION FOR PREFERENCE was filed in the words and figures as follows:

(Title Omitted.)

State of Florida,
County of Dade. ss.

Stuart N. Willner, being duly sworn, deposes and says:

1. That he is the President of Tropical Marine Products, Inc., the Plaintiff herein, and is authorized to make this affidavit.

2. That Tropical Marine Products, Inc., was the owner and operator of the fishing vessel M/P Sea

Pak which was insured for marine risks by the Birmingham Fire Insurance Company of Pennsylvania, the Defendant herein.

3. That on or about August 13, 1954, the M/V Sea Pak became a total loss by reason of foundering and due demand was made upon the Defendant for payment under the aforementioned policy of marine insurance. The Defendant refused to pay for the loss under the policy and has since continually refused to pay without stating any reason therefore, to the continued detriment of the Plaintiff.

4. That prior to the loss of the M/V Sea Pak, the operation of the Plaintiff company was a profitable venture due principally to the special equipment and size of the M/V Sea Pak which was adapted to the type of fishing in which it was employed. Since the loss of the vessel, the Plaintiff has been without sufficient funds to properly replace the Sea Pak, but has instead been forced to purchase two small and inadequate vessels to continue its fishing operations and thus to save the special fishing franchise granted to the Plaintiff, which is of great value. The vessels presently employed enable the Corporation to maintain only a small portion of the catch formerly made with the Sea Pak and the profits have been reduced to a fraction of the former earnings of the Corporation.

5. That until payment is made by the Defendant for the loss sustained, the Plaintiff has no means available for supplementing the reduced operation by addition of a vessel properly suited to the type of fishing in which the Plaintiff is engaged.

6. That the members of the crew of the M/V Sea Pak who are necessary witnesses in trial of the loss are presently in Miami and will remain here until the second week of June at which time they must return to Caicos to resume the limited fishing which remains possible to the Plaintiff. Depositions have been taken of these crew members; however, Plaintiff desires to produce these men in Court if it is possible.

7. That the members of the crew of the motor vessel Sea Pak are natives of Caicos Island, British West Indies and that is the permanent place of the boat and residence and it will be virtually impossible at any other time to produce the witnesses to the Court.

Wherefore, your deponent respectfully requests that a preference be granted and that Plaintiff be given an early date for trial.

Sworn and subscribed to before me this 17th day of May, 1955.

(S.) STUART N. WILLNER,
(Stuart N. Willner).

.....

Notary Public, State of Florida at Large.

I Hereby Certify that a copy of the foregoing Affidavit in Support of Application for Preference was delivered to Smathers, Maxwell & Dyer, at their office in the DuPont Building, Miami, Florida, this 17th day of May, 1955.

(S.) ARTHUR L. WILLNER,
(Arthur L. Willner),
Attorney for Plaintiff.

310 S. E. 2nd Avenue,
Miami 32, Florida.

On May 20, 1955 INTERROGATORIES to Defendant was filed in the words and figures as follows:

(Title Omitted.)

To: Smathers, Thompson, Maxwell & Dyer
Attorneys for Defendant
DuPont Building
Miami 32, Florida

The plaintiff requests that the defendant, Birmingham Fire Insurance Company of Pennsylvania, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. State whether the Birmingham Fire Insurance Company of Pennsylvania entered into a contract with T. A. Barba for insurance in the sum of $30,000.00 on the motor fishing vessel M/V Sea Pak on or about August 14, 1953.

2. State whether the contract of insurance entered into between Birmingham Fire Insurance Company of Pennsylvania and T. A. Barba on the M/V Sea Pak attached as a risk covered by Birmingham Fire Insurance Company of Pennsylvania.

3. State whether on or about November 10, 1953 an indorsement was attached to the policy of insurance on the M/V Sea Pak showing Tropical Marine Products, Inc., to hold title to the M/V Sea Pak with loss payable to T. A. Barba and Tropical Marine Products, Inc., as their interest may appear.

4. State whether any report or reports on the material condition of the M/V Sea Pak were received by Birmingham Fire Insurance Company of Pennsylvania from any source other than the insured prior to notice of loss of that vessel.

5. State when the report or reports referred to in question 2, if any, were received by Birmingham Fire Insurance Company of Pennsylvania or its agents or employees.

6. State what action was taken by Birmingham Fire Insurance Company of Pennsylvania after receipt of the report referred to in question 2.

7. State whether a contract of insurance issued by Birmingham Fire Insurance Company of Pennsylvania to cover loss of the M/V Sea Pak was in full force and effect on August 13, 1954.

8. State whether the Birmingham Fire Insurance Company of Pennsylvania, or an officer or agent

thereof, at any time after August 13, 1954 received notice of loss of the vessel M/V Sea Pak from any insured or agent thereof so listed on the policy of insurance on the M/V Sea Pak.

9. State what action was taken by Birmingham Fire Insurance Company of Pennsylvania on a notice of loss of the M/V Sea Pak received from insured or an officer or agent thereof.

10. State with particularity reason for refusal by Birmingham Fire Insurance Company of Pennsylvania to pay the plaintiff in this action for the loss sustained under the policy of insurance issued on the M/V Sea Pak.

11. State with particularity the cause for foundering of the M/V Sea Pak as known to the Birmingham Fire Insurance Company of Pennsylvania.

12. State whether the cause for foundering of the M/V Sea Pak was a risk covered by the policy of insurance on that vessel issued by Birmingham Fire Insurance Company of Pennsylvania.

13. State upon what source of information the Birmingham Fire Insurance Company of Pennsylvania refused payment to insured for the loss of the M/V Sea Pak.

14. State upon whose advice the Birmingham Fire Insurance Company of Pennsylvania determined that the loss of the M/V Sea Pak was not a loss payable under the policy of insurance on the vessel.

15. State whether Birmingham Fire Insurance Company of Pennsylvania, at any time during the period in which the policy of insurance on the M/V Sea Pak was in effect, or at any time thereafter, tendered to the plaintiff a return of the premiums paid under that policy by the plaintiff.

16. State at what date the Birmingham Fire Insurance Company of Pennsylvania considered its policy of insurance on the M/V Sea Pak terminated.

(S.) ARTHUR L. WILLNER,
(Arthur Lee Willner),
Attorney for Plaintiff.

310 S. E. 2nd Ave.,
Miami 32, Florida.

I Hereby Certify that a copy of the foregoing Interrogatories was delivered to Smathers, Thompson, Maxwell & Dyer this 20th day of May, 1955.

(S.) ARTHUR L. WILLNER,
Attorney for Plaintiff.

On May 20, 1955 ANSWERS TO DEFENDANT'S INTERROGATORIES was filed in the words and figures as follows:

(Title Omitted.)

State of Florida,
County of Dade.

Comes now Stuart N. Willner, President of Tropical Marine Products, Inc., and says:

1. That he is authorized to make this statement for the corporation.

2. That on information and belief he brings the following Answers to Defendant's Interrogatories, and further says:

1. In answer to Interrogatory Number 1, a sprung butt on the vessel's bottom, forward on the port side at a depth of about six (6) feet below sea level and under the forward freezer box.

2. In answer to Interrogatory Number 2, none.

3. In answer to Interrogatory Number 3, the sprung butt apparently faced forward in such a manner that when the vessel was under way, the condition was caused to worsen, and which was further aggravated by the prevailing weather conditions at the time.

STUART N. WILLNER.

Sworn and subscribed to before me this 13 day of May, 1955.

MAE JOHNSON,
Notary Public, State of Florida, at Large.

(Seal)

My commission expires: Nov. 13, 1957.

I Hereby Certify that a copy of the foregoing Answers to Defendant's Interrogatories was delivered to Smathers, Maxwell and Dyer, at their office in the DuPont Building, Miami, Florida, on this 13th day of May, 1955.

(S.) ARTHUR L. WILLNER,
(Arthur L. Willner),
Attorney for Plaintiff.

310 S. E. 2nd Avenue,
Miami, Florida.

(Copy.)

On May 27, 1955 OBJECTIONS TO INTERROGATORIES was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant, by and through his undersigned Attorneys, and objects to the following interrogatories served upon it by the Plaintiff in the above cause:

Interrogatories 2, 5, 6, 13 and 14,

upon the grounds that the said interrogatories are so vague as to not permit an Answer to be framed thereto, and upon the further grounds that the said interrogatories are immaterial and irrelevant nor

are they designed to illicit information which may lead to imformation which is material and relevant.

SMATHERS, THOMPSON,
MAXWELL & DYER,
By (S.) DOUGLAS D. BATCHELOR,
Attorneys for Defendant.

I Hereby Certify that a copy of the foregoing Objections to Interrogatories was mailed to Arthur L. Willner, Esq. Attorney for Plaintiff, 310 S.E. 2nd Avenue, Miami 32, Florida, this 27 day of May, 1955.

(S.) DOUGLAS D. BATCHELOR,
Of Counsel.

On June 1, 1955 ANSWERS TO INTERROGATORIES was filed in the words and figures as follows:

(Title Omitted.) *

State of New York,
County of, ss.

Comes now Birmingham Fire Insurance Company Of Pennsylvania, by its undersigned Agent, and answers the interrogatories heretofore served upon it as follows:

1. Yes.

3. Yes.

4. No.

7. No. The policy in effect on August 13, 1954, covers only loss by the perils set forth in the policy.

8. Yes.

9. The claim was denied.

10. The failure of the assured to satisfy the Defendant that the loss occurred from a peril insured against under the policy.

11. The Defendant has no knowledge of the cause of the founder other than the information which it was given by the Plaintiff and its employees.

12. See answer to Interrogatory 11.

15. No.

16. August 14, 1955, at 12:00 o'clock Noon, Eastern Standard Time.

AMERICAN INTERNATIONAL MARINE AGENCY OF NEW YORK, INC.

By (Illegible),
Agent for Birmingham Fire Insurance Company of Pennsylvania.

Sworn to and subscribed before me this 27 day of May, 1955.

THOMAS F. MOYER,
Notary Public, State of New York.

My Commission expires: Notary Public, State of New York, No. 31-2001550. Qualified in New York County, Certified with N. Y. County Clerk Commission Expires March 30, 1957.

I Hereby Certify that a copy of the foregoing Answers to Interrogatories was mailed to Arthur L. Willner, Esq. Attorney for Plaintiff, 310 S. E. 2nd Avenue, Miami 32, Florida, this 1st day of June, 1955.

(Illegible)

On June 1, 1955 ORDER on application for preference and for productions was filed in the words and figures as follows:

(Title Omitted.)

This cause coming on to be heard upon the Plaintiff's Application for Preference and upon the Plaintiff's Motion to require the productions of certain documents in the possession of the Defendant, and the Court having heard argument of counsel, it is, upon consideration,

Ordered and Adjudged that the Application for Preference be and the same is hereby denied, and it is further

Ordered and Adjudged that the Motion to produce a report made to the Defendant by a marine surveyor at the time the policy of insurance was issued, be and the same is hereby granted, such report to

be produced for inspection and/or copying at a time mutually agreeable to counsel for the parties. As to all other matters, the said Motion is denied.

Dated at Miami, Florida, this 1st day of June, 1955.

(S.) JOHN W. HOLLAND,
Chief Judge.

On July 6, 1955 NOTICE OF FILING DEPOSITION was filed in the words and figures as follows:

(Title Omitted.)

To: Dow & Symmers, Esqs.
70 Pine Street
New York, New York
Smathers, Thompson, Maxwell & Dyer, Esq.
DuPont Building
Miami 32, Florida

Please Take Notice that on July 5, 1955 at the office of the Clerk of the District Court of the United States in and for the Southern District of Florida, Miami Division, the depositions of Thomas A. Barba, Joseph Frederick Moran, Leonard Oliff Belinsky, and Henry Mills in the above-entitled cause were filed.

Dated at Miami, Florida, this 5th day of July, 1955.

FREELAND & CHERTOK, INC.
By (S.) MARTIN AVERSON,
Court Reporters.

1030 Seybold Building,
Miami, Florida.

We Certify that a true copy of the foregoing notice of filing deposition was sent to the addressees herein on the 5th day of July, 1955 by depositing same in the United States mail with sufficient postage thereon.

FREELAND & CHERTOK, INC.
By (S.) MARTIN AVERSON.

On September 16, 1955 REQUEST TO PRODUCE was filed in the words and figures as follows:

(Title Omitted.)

To: Smathers, Thompson, Maxwell and Dyer
Attorneys for Defendant
duPont Building
Miami 32, Florida.

Please Take Notice that Defendant is required to produce at the trial of the above captioned matter:

1. All communications from the Plaintiff or persons acting on its behalf to the Defendant or persons acting on its behalf relating in any way to the insurance under the policies in suit and the presentation of claim for loss.

2. All communications from Barba or persons acting on its behalf to Defendant or persons acting on its behalf relating in any way to the insurance under the policies in suit.

3. All communications from Plaintiff or persons acting on its behalf to Defendant or persons acting

on its behalf relating to the extension of and/or renewal of the insurance on the vessel in question.

4. All communications, including surveys, to Defendant or persons acting on its behalf from its agents, surveyors and any other persons relating in any way to the insurance under the policies in suit including, without restricting the generality of the above, all communications and surveys from J. Stuart and Fred Hallbauer, and in particular, the original survey, a copy of which was attached to the Request for Admissions and marked Exhibit 2 thereto.

5. All other books, documents, papers, checks, memoranda in possession of or under the control of the Defendant relevant to the issues in the case.

6. The original reinstatement of coverage dated May 11, 1954, a copy of which is attached to the Request for Admissions and marked Exhibit 3 thereto.

7. The original request by Cauley and Martin, dated August 2, 1954, addressed to John E. McKinley, Inc., general agents for American International Marine Agency, requesting renewal of the then current policy on the Sea Pak. A copy of the document is attached to the Request for Admissions, served this date, and marked Exhibit 5 thereto.

ARTHUR LEE WILLNER, Esq.
Attorney for Plaintiff,
Of Counsel,
DOW & SYMMERS,
WILBUR E. DOW, JR., ESQ.,
By ARTHUR L. WILLNER.

I Hereby Certify that a true and correct copy of the foregoing Request to Produce was delivered, in person, by me, to the above named addressee this 16th day of September, 1955.

ARTHUR L. WILLNER.

On September 16, 1955 REQUEST FOR ADMISSIONS was filed in the words and figures as follows:

(Title Omitted.)

To: Smathers, Thompson, Maxwell and Dyer
Attorneys for Defendant
duPont Building
Miami 32, Florida.

Please Take Notice that the Plaintiff in this action required the Defendant to admit, for the purposes of this action only, the genuineness of the documents attached hereto and the truth of certain matters of fact set forth herein within ten (10) days of the service of this request as follows:

1. The genuineness of a copy of the policy of insurance No. 26132, with all indorsements thereto, a copy of which was attached to the Complaint.

2. The genuineness of the Proof of Total Loss, copies of which are attached hereto and marked Exhibit 1, and also attached thereto are Affidavits of Insurance, which are to be admitted as genuine.

3. The genuineness of the final survey report of August 10, 1953 by James B. Stuart, Marine Surveyor,

a copy of which is attached hereto and marked Exhibit 2, the copies being those which were provided by Defendant's counsel.

4. The genuineness of the reinstatement of coverage dated May 11, 1954, a copy of which is attached hereto and marked Exhibit 3.

5. The genuineness of the paid up insurance premium contract with the First National Bank of Miami, Florida, a copy of which is attached hereto and marked Exhibit 4.

6. That the insurance brokers, Cauley and Martin, on August 2, 1954 requested John E. McKinley, Inc., general agents for American International Marine Agency, to prepare and forward renewal of the then current policy on the Sea Pak. A copy of the said request is attached hereto and marked Exhibit 5.

7. That proper and timely notice of abandonment was made.

8. That the insurer refused the abandonment.

9. That all formalities in connection with the presentation of the loss have been complied with.

ARTHUR LEE WILLNER, Esq.
Attorney for Plaintiff,
Of Counsel,
DOW & SYMMERS,
WILBUR E. DOW, JR., Esquire,
By ARTHUR L. WILLNER.

I Hereby Certify that a true and correct copy of the foregoing Request for Admissions of the attached Exhibits hereinabove mentioned was delivered, in person, to the above named addressee, by me this 16th day of September, 1955.

ARTHUR L. WILLNER.

EXHIBIT I.

Proof of Total Loss.

To: Birmingham Fire Insurance Company of Pennsylvania

American International Marine Agency of New York, Inc.,
108 Maiden Lane
New York 8, New York

By your policy of insurance No. 26138 dated the 14th day of August, 19... issued to T. A. Barba by Cauley & Martin, your agent at Miami, Florida for the term of one (1) year and the title indorsement thereto attached assigning the said policy to Tropical Marine Products, Inc., dated November 10, 1953, you insured Tropical Marine Products, Inc., against losses as set out in the said policy for the amount of $30,000.00 as more fully appears by the printed or written portions and conditions of the said policy.

The property thus insured belonged to Tropical Marine Products, Inc., a Florida corporation, and no other person or party had any interest therein.

The vessel, to-wit; "Sea Pak", insured by the said policy sunk on Friday, August 13, 1954 approximately one-quarter of a mile south of Long Cay of the British possession of South Caises Island located three miles from the town of Cookbourne Harbour, British West Indies.

The whole value of the vessel amounted to Fifty Thousand ($50,000.00) Dollars which was the actual cash value at the time of the sinking and the whole amount of the loss sustained is Fifty Thousand ($50,000.00) Dollars.

The whole insurance on said property at the time of the sinking, including that above mentioned, was $30,000.00 and there was no other insurance on the said vessel.

That the vessel was a total and complete loss and nothing of any value was salvaged of or from the vessel "Sea Pak", except approximately 6 life preservers, a small dinghy and the American and British flags; and further all the appurtenances, machinery, radios, masts, bow-sprits, anchors, cables, chains riggings, tackle, apparel, furniture and all the other necessaries thereunto appertaining and belonging to the above mentioned vessel were lost and none of the foregoing was salvaged and the vessel in its entirety sunk at the hereinabove mentioned place at the hereinabove mentioned time and date.

That the sinking was caused by a peril of the sea unknown to the captain, members of the crew or owner of the said vessel and further that the said vessel was then stout, staunch and strong, had her

cargo well and sufficiently stowed and secured, was well masted, manned, tackled, victualed, appareled, and appointed, and was in every respect fit for sea and the voyage she was about to undertake; that in the prosecution of said voyage nothing material occurred until the 13th day of August, 1951 when the sinking described heretofore in detail in the Master's Protest occurred.

Nothing has been done by the owner assured of the vessel or his agents to violate the conditions of the policy which would render it void.

Witness my hand and seal this 3rd day of September, 1954.

TROPICAL MARINE PRODUCTS, INC.,
By STUART N. WILLNER,
(Stuart N. Willner),
President.

Attest:
ARTHUR WILLNER,
Secretary.

State of Florida,
County of Dade. ss.

I, an officer authorized to take acknowledgments and administer oaths according to the laws of the State of Florida, hereby certify that Stuart N. Willner and Arthur L. Willner, as President and Secretary respectively of Tropical Marine Products, Inc., to me personally known this day acknowledged before me that they executed the foregoing proof of total loss as such officers of said corporation and that they affixed thereto the official seal of said corporation and

I further certify that I know the said persons making said acknowledgments to be the individuals who executed the said proof of total loss.

In witness whereof, I hereto set my hand and official seal at Miami, Dade County, State of Florida this 3rd day of September, 1954.

(Illegibile),
Notary Public, State of Florida at Large.

My Commission Expires: Jan. 8, 1938.

State of Florida,
County of Dade. ss.

Comes now Stuart N. Willner who, being first duly sworn, deposes and says:

That he is President of Tropical Marine Products, Inc., that he has read the foregoing proof of total loss and the facts therein contained are true to the best of his knowledge and belief; and further, that he is authorized on behalf of the corporation to make this said statement and has caused the corporate seal and attestation of the Secretary thereto to be affixed.

STUART N. WILLNER,
(Stuart N. Willner).

Subscribed and sworn to before me this 3rd day of September, 1954.

(S.) JAMES G. (Illegible),
Notary Public, State of Florida at Large.

My Commission Expires: Jan. 8, 1958.

Affidavit of Insurance Coverage.

State of Florida,
County of Dade. ss.

Comes now Stuart N. Willner who, being first duly sworn, deposes and says:

1. That he is President of Tropical Marine Products, Inc., the sole owner of the vessel "Sea Pak"; that he is authorized to make this affidavit on behalf of the Corporation and that he has personal knowledge of the facts herein stated.

2. That he knows of his own personal knowledge of the insurance carried on the vessel "Sea Pak", and that the only insurance on the said vessel is Birmingham Fire Insurance Company of Pennsylvania Policy No. 26132 and the indorsements thereto attached.

3. That other than the hereinabove stated insurance there is no other insurance of any type, nature or form on the said vessel.

STUART N. WILLNER.

Subscribed and sworn to before me this 3 day of September, 1954.

ARTHUR N. WILLNER,
Notary Public, State of Florida at Large.

My Commission Expires: (Illegible).

Affidavit of Insurance Coverage.

State of Florida,
County of Dade. ss.

Comes now Stuart N. Willner who, being first duly sworn, deposes and says:

1. That he is President of Tropical Marine Products, Inc., the sole owner of the vessel "Sea Pak"; that he is authorized to make this affidavit on behalf of the Corporation and that he has personal knowledge of the facts herein stated.

2. That he knows of his own personal knowledge of the insurance carried on the vessel "Sea Pak", and that the only insurance on the said vessel is Birmingham Fire Insurance Company of Pennsylvania Policy No. 26132 and the indorsements thereto attached.

3. That other than the hereinabove stated insurance there is no other insurance of any type, nature or form on the said vessel.

STUART N. WILLNER.

Subscribed and sworn to before me this 3 day of September, 1954.

ARTHUR N. WILLNER,
Notary Public, State of Florida at Large.

My Commission Expires: (Illegible).

EXHIBIT 2.

August 11, 1953

Mr. John McKinley
John McKinley, Inc.
DuPont Building
Miami, Florida

Re: Tropical Key Products, Inc. J. A. Barba, President, Refrigerated Vessel "Sea Pak" Govt. No. 251199.

Dear Mr. McKinley:

This refers to preliminary survey on the above vessel dated July 21, 1953.

Final survey was held on August 10 and developed the following particulars: —

Vessel was originally built at East Boothbay, Maine for the U. S. Coast Guard and rebuilt in Miami in 1953.

Length 71′ 7″
Beam 13′ 6″
Draft 4′ 6″

C02 System. Now completed and tested July 26.

Auxiliary Generator 32 Volt is mounted on top of the after trunk cabin under a wooden box. The top and lower half of both sides of the box will be open when generator is running.

Bottled Gas Stove is in place and woodwork back of stove is protected. Tank is not in place but will be placed on the main deck port side near after end of deckhouse. Feed line will be run outside alongside of trunk cabin and then down to the stove. Main shut off valve (packless) will be placed in the line at the stove and also at the tank.

Engines have been tested and found in order and a trial trip will be held today or tomorrow and if everything is satisfactory, the vessel will leave immediately.

Mr. Berlinski will take his time going down and will run only during the day and expects the trip to take 4 days.

Approximately 1000 gallons of gasoline will be carried in drums on deck from amidship aft, and approximately 1000 gallons of diesel fuel in drums will be carried below deck in the forward freezing compartment. Both gasoline and fuel oil will be discharged on arrival.

In my opinion the vessel is suitable for the trade and as far as it is possible to ascertain is in good condition.

Yours very truly,
JAMES P. STUART,
Surveyor.

JPS—

Built for U. S. Coast Guard.

Purchased by Tropical Key Products, Inc., J. A. Barba, President.

Composition
Wood 83′ x 14′ x 4½′

Frames
Wood 2u x 2u—12″ C

Planking
Wood 1 3/4″

Fastening

Spiked and bolted.

Engines

Sterling Coast Guard. Age unknown. 210 N. P. each, 6 cylinder, 1400 R. P. M. Completely overhauled 1953.

Tanks

Two iron rectangular forward end of engine room, 450 gallons.

Exhaust Pipes

Copper, now from engine room aft, salt water cooled.

Speed

Estimated 12 mph.

Ventilation

Two 8" vents with cowl hoods on top of deck house into engine room. One exhaust blower and dust taking air from amidships under engine flooring.

Batteries

Four, leaded boxes with ventilated tops. new.

Bilge Pumps

Handy Billy on deck 2½" suction to bilge and salt water—1½" discharge. Gasoline auxiliary pump on deck 1".

Wiring

Now being checked and renewed.

Refrigeration

Machinery located on main deck in deckhouse over engine room.

Generator

Auxiliary gasoline generator will be mounted on top of after trunk and fed from gasoline tank on deck.

Fire Equipment

6—C02 extinguishers throught the vessel. C02 system in engine room—bottles now being refilled and checked.

Galley

Below deck aft, bottled gas stove, tanks on deck. Installation not yet completed.

Anchors

250 lbs, 100 lbs., 60 lbs., 30 lbs.

Chain

350′ of ½″.

Lines

250′ of 1″.

Windlass

Hand.

Additional lines will be put on board, also two spare propellers.

Decks

Plywood laid over old decks.

Bunkhouses
Plywood new.

Ship to Shore
200 Watt set, not yet on board, will be connected up and tested prior to leaving.

Tender
14' will be carried on after trunk.

Searchlight
Mounted on top of deckhouse.

Note

Pages 42-43 are on Card 2.

Recitation.

The copy that the following page was taken from is not legible, it was in such bad condition that it could not even be typed.

Note

Pages 45 and 46
are on Card 2.

On October 6, 1955 FINAL JUDGMENT was entered by the Court and filed in the words and figures as follows:

United States District Court, Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs. Case No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant.

This cause came on to be tried by the Court, the Court having heard testimony and considered the exhibits and now being advised, enters the following judgment herein.

Findings of Fact.

1. The Defendant, Birmingham Fire Insurance Company of Pennsylvania, insured the refrigerated vessel "Sea Pak" under an American Institute Time Hull Policy, from August 14, 1953 to August 14, 1954. The insurance was originally issued in the name of T. A. Barba and on November 10, 1953, the name of the assured was changed to the Plaintiff, Tropical Marine Products, Inc. The policy was in the sum of $30,000.00 and the pertinent part of the insuring clause reads as follows:

"Touching the Adventure and Perils which we, the said Underwriters, are contended to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Coun-

ter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said vessel, etc., or any part thereof."

2. The "Sea Pak" was a wooden hull vessel originally built for the United States Coast Guard. She was 71'7" long, 13'6" wide and drew 4'6" of water. In the Summer of 1953, she had been overhauled in Miami and in August, 1953, was in good condition and seaworthy. She left Miami in August, 1953, and was operated from that time until her loss, in and around the Caicos Islands. She had not been hauled out of the water subsequent to August, 1953, although she had been placed in shallow water and her bottom scrubbed on several occasions while she remained afloat.

3. The "Sea Pak" left Cockburn Harbour, South Caicos Islands, on August 9, 1954. It proceeded to an anchorage in the lee of Long Key. This was a distance of about eight miles. The anchorage was protected from the prevailing winds and from the sea and the water in the anchorage remained calm all the time the "Sea Pak" was anchored there. The vessel remained at anchor in about 15 feet of water in this protected area until approximately 5:00 A.M. on August 13. During this time the vessel was collecting conch from small skiffs that were fishing in that area.

4. At about noon on August 12, the Master noticed that the "Sea Pak" was beginning to take on an un-

usual amount of water and that the automatic pump was working more than normally necessary. During that afternoon and night the leaking became progressively worse. An inspection of the vessel revealed that the water was coming from underneath a refrigerated space in the forward part of the ship. Because of the construction of the interior of the vessel, the bilge underneath this area was inaccessible. Shortly before daylight on August 13, the Master felt that the leak had developed to such an extent that he should attempt to return to Cockburn Harbour.

5. As soon as it was daylight, or about 5:00 A.M., the anchor was raised and the boat proceeded around the south end of Long Key into the open water of Turks Island Passage in an effort to return to Cockburn Harbour. At this time, the sea on the wind-ward side of Long Key was choppy and there was a moderate breeze. These conditions were not unusual for that area and were not such as would ordinarily have caused the vessel any difficulty.

6. After the vessel got underway, the leak continued to get progressively worse and before the ship could reach Cockburn Harbour, the leak had progressed to such an extent that the vessel's engine was drowned out. The vessel then drifted back along the shoreline of Long Key until the Master ordered the crew to abandon her. The four men on board then rowed ashore in a 14' row boat which was being towed astern of the "Sea Pak" and the "Sea Pak" eventually sank. Because of the depth of the water, no salvage attempt was made.

7. There is no explanation as to what caused the leak which resulted in the loss of the vessel.

8. The Plaintiff has not shown that the vessel was seaworthy immediately prior to the developing of the leak which resulted in the loss of the vessel.

Conclusions of Law.

1. This Court has jurisdiction of the parties and of the subject matter of this litigation, and venue is properly laid in the Miami Division of the Southern District of Florida.

2. The policy here in question insures the vessel against loss from extraordinary occurrences and does not insure her against those ordinary perils which vessels must encounter. Hazard v. Insurance Co., 33 U. S. 557; Union Marine Ins. Co. v. Charles D. Stone & Co., 15 F. 2d 937.

3. The burden of proving that the loss comes within the terms of the policy rests upon the assured. Continental Ins. Co. of New York v. Patton-Tully Transp. Co., 212 F. 2d 543; Kelly, Weber & Co. v. Franklin Fire Ins.c, Co., 43 F. 2d 361.

4. When a vessel develops a leak in ordinary weather and seas, from no apparent peril insured against, there is no presumption that the damage was sustained because of a peril of the sea and the Plaintiff must establish that the loss was the result of an insured peril. Watson v. Providence Washington Ins. Co., 106 F. Supp. 244 (opinion approved 201 F. 2d 736); Klein v. Globe & Rutgers Fire Ins. Co., 2 F. 2d 137; Jahn v. Steamship Folmina, 212 U. S. 264; Long Dock Mills & Elevator Co. v. Mannheim Ins.

Co., 116 Fed. 886; Swift v. Union Mutual Insurance Co., 122 Mass. 573.

5. The Plaintiff having failed to meet such burden, the Defendant is entitled to an entry of a judgment in its favor, together with its costs.

It is thereupon Ordered that the Clerk of the Court enter judgment for the defendant, costs to be taxed against the plaintiff.

Done and Ordered at Miami, Florida, this 6th day of October, 1915.

(S.) GEORGE W. WHITEHURST,
United States District Judge.

On October 7, 1955 FINAL JUDGMENT by Clerk was filed in the words and figures as follows:

In the United States District Court in and for the Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs.
Birmingham Fire Insurance Company, of Pennsylvania, Defendant.

Case Number 6078-Miami-Civil.

This cause came on for trial before the Court and consistent with the Findings of Fact and Conclusions of Law, entered on October 6th, 1955, it is,

Ordered and Adjudged that the above cause is dismissed and judgment is entered in favor of the defendant, and that costs are taxed against the plaintiff.

Done and Ordered at Miami, Florida, this 6th day of October, 1955.

JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By ANNA M. FITZSIMMONS,
Deputy Clerk.

(Seal)
(Court Seal.)

On October 17, 1955 MOTION of Plaintiff FOR NEW TRIAL was filed in the words and figures as follows:

(Title Omitted.)

Plaintiff, Tropical Marine Products, Inc., moves the Court pursuant to Rule 59 (a) of the Federal Rules of Civil Procedure to set aside the judgment entered herein on the 6th day of October, 1955, amend the Conclusions of Law or make new Conclusions and enter a new judgment on the grounds that:

1. The Court erred in not including all of the pertinent parts of the policy of insurance in its first Finding of Fact, as originally set out in plaintiff's trial memorandum and for the sake of convenience included in the Memorandum of Law attached hereto.

2. The Court erred in concluding that as a result of Finding of Fact No. 8, that plaintiff's policy of in-

surance was thereby vitiated although there was no provisions in the policy that required any further proof of seaworthiness after the risk attached.

3. The Court erred in Conclusion of Law No. 2 in holding that the policy insured only against extraordinary occurrences and not ordinary perils that a vessel must encounter.

4. The Court erred in not finding, as a matter of law, that the policy covers all perils of the sea, whatever they may be, the negligence of the Master and crew, and losses due to latent defects in her hull.

5. The Court erred in applying a wrong and unworkable standard in Conclusions of Law Nos. 4 and 5 to the hull policy at issue in this case as distinguished from a cargo policy, an entirely different policy and subject to entirely different standards of interpretation of the use of the word "seaworthiness" as contained in those respective contracts.

(S.) ARTHUR L. WILLNER,
(Arthur Lee Willner, Esq.),
Attorney for Plaintiff.

310 S. E. 2nd Avenue,
Miami, Florida.

Of Counsel:
WILBUR E. DOW, JR., ESQ.

I Hereby Certify that a copy of the above Motion for New Trial was delivered in person to Smathers, Thompson & Dyer, Attorneys for Defendant, DuPont Building, Miami, Florida, this 17th day of October, 1955.

(S.) ARTHUR WILLNER.

On November 4, 1955 ORDER denying motion for new trial, etc. was filed in the words and figures as follows:

(Title Omitted.)

This cause coming on to be heard before me upon Motion of the Plaintiff for a New Trial, to set aside the judgment, amend the Conclusions of Law or make new Conclusions, and enter a new judgment, and argument of counsel having been heard and the Court having considered the Memorandum of Law submitted by counsel for the respective parties, upon consideration it is

Ordered that the Plaintiff's Motions be and the same hereby are denied.

Done and Ordered at Miami, Florida, this 4th day of November, 1955.

(S.) GEORGE W. WHITEHURST,
United States District Judge.

On December 23, 1955 ORDER extending time for filing the notice of appeal, etc. was filed in the words and figures as follows:

(Title Omitted.)

This Cause coming on to be heard upon the motion of the plaintiff for the extension of time to file a Notice of Appeal and it appearing from the Motion and testimony and argument of counsel that excus-

able negligence exists and that the counsel for the plaintiff has not received notice of the order denying a new trial, it is, thereupon,

Ordered and Adjudged that the time for filing the Notice of Appeal and taking the appeal be extended thirty (30) days from the expiration of the original time prescribed for taking appeals, to-wit, January 3, 1956.

Done and Ordered at Miami, Florida, this 23rd day of December, 1955.

EMETT C. CHOATE,
United States District Judge.

On December 30, 1955 NOTICE OF APPEAL by Plaintiff was filed in the words and figures as follows:

In the United States District Court in and for the Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs. No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant.

Notice is hereby given that Tropical Marine Products, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on October 6, 1955, in keeping with an order of this Court

dated December 23, 1955 extending the time for taking an appeal until January 3, 1956.

(S.) ARTHUR L. WILLNER,
(Arthur Lee Willner, Esq.),
Attorney for Plaintiff.

310 S. E. 2nd Avenue,
After January 1, 1956—
175 S. W. 17th Avenue,
Miami, Florida.

Of Counsel:
WILBUR E. DOW, JR., ESQ.

I Hereby Certify that a copy of the foregoing Notice was delivered to Smathers, Thompson, Maxwell and Dyer, Attorneys for the Defendant, Du Pont Building, Miami, Florida, in person this 30th day of December, 1955.

(S.) ARTHUR L. WILLNER.

On December 30, 1955 COST BOND was filed in the words and figures as follows:

(Title Omitted.)

Know All Men By These Presents, that Tropical Marine Products, Inc., as Principal, and Continental Casualty Company, an Illinois corporation, as Surety, stand firmly bound unto the defendant, Birmingham Fire Insurance Company of Pennsylvania, in the penal sum of Two Hundred Fifty Dollars ($250.00) to cover

costs heretofore or hereafter assessed in the above entitled cause.

Dated this ... day of December, 1955.

The condition of this bond is that whereas the said Tropical Marine Products, Inc. has entered its appeal from the Final Judgment rendered in the above entitled cause on October 6, 1955, to the United States Circuit Court of Appeals for the Fifth Circuit, and by the Federal Rules of Civil Procedure is required to post a cost bond in the said penal sum, then if the said Tropical Marine Products shall pay all costs assessed in this case against him either by the above styled Court or the said Circuit Court of Appeals in connection with the above entitled cause or the said appeal, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

TROPICAL MARINE PRODUCTS, INC. (Seal)

By (S.) ARTHUR L. WILLNER,
Secretary.

CONTINENTAL CASUALTY COMPANY,
An Illinois Corporation,

By (S.) M. E. KERR, (Seal)
Its Attorney in Fact.

(S.) MAE JOHNSON,
(S.) BERTA L. HUNTING.

Taken and Approved by Me, Julian A. Blake, Clerk United States District Court, Southern District of Florida, Miami Division.

By (S.) EARLE F. SPRIGG,
Deputy Clerk.

(Court Seal.)

On February 7, 1956 STIPULATION and ORDER EXTENDING TIME TO FILE RECORD AND DOCKET APPEAL was filed in the words and figures as follows:

(Title Omitted.)

It is hereby stipulated and agreed, by and between the attorneys for the parties hereto, subject to the order of the Court, that the time within which plaintiff-appellant shall file the record on appeal and docket the appeal from the judgment entered herein on October 6, 1955, in the United States Court of Appeals for the Fifth Circuit be extended to and including April 1, 1956.

Dated: Miami, Florida, February 7, 1956.

(S.) ARTHUR LEE WILLNER,
(Arthur Lee Willner, Esq.),
Attorney for Plaintiff-Appellant.

(S.) DOUGLAS D. BATCHELOR,
SMATHERS, THOMPSON,
MAXWELL & DYER,
Attorneys for Defendant-Appellee.

So Ordered: February 7th 1956.

(S.) EMETT C. CHOATE,
United States District Judge.

On February 17, 1956 TRANSCRIPT OF PROCEEDINGS was filed in the words and figures as follows:

(Title Omitted.)

Miami, Florida,
Tuesday, September 27th, 1955,
10:00 o'clock a.m.

The above entitled cause came regularly on for trial before the Honorable George W. Whitehurst, United States District Judge, in open Court, at Miami, Florida, on Tuesday, September 27th, 1955, at 10:00 o'clock a.m.

Appearances:

Wilbur Dow, Esq., and Arthur L. Willner, Esq., on behalf of Plaintiff;

Douglas D. Batchelor, Esq., and David W. Dyer, Esq., of the firm of Smathers, Thompson & Dyer, on behalf of Defendant.

The Court:

Mr. Clerk, call the case on today's calendar.

The Clerk:

Tropical Marine Products, Inc., plaintiff, versus Birmingham Fire Insurance Company of Pennsylvania, Defendant, No. 6078-M-Civil; Mr. Dow and Mr. Willner for the plaintiff and Mr. Batchelor and Mr. Dyer for the Defendant.

Mr. Willner:

The plaintiff is ready.

Mr. Batchelor:
The defendant is ready.

The Court:
I think it will be helpful if counsel will state briefly what the plaintiff's claim is.

Mr. Dyer:
Before that occurs, Mr. Batchelor, my partner here, has prepared this case from the beginning and has prepared to try it. By virtue of a deposition that was taken last Thursday in South Caicos Island it will probably be necessary to call him as a witness. There is no objection, I understand, from opposing counsel that that be done. I just want to make that statement at the outset.

The Court:
To call counsel as a witness?

Mr. Dyer:
Yes, sir, Mr. Batchelor.

The Court:
That is quite all right.

Mr. Dyer:
I just wanted that understood before we proceed.

Mr. Willner:
My name is Arthur Lee Willner. I would like to introduce Mr. Stewart Willner, President of the Company, and I would like to introduce to the Court Mr. Wilbur Dow. Mr. Dow is admitted to practice in the State of Florida, the Second, Fourth and Fifth Cir-

cuits, the District of Columbia and the United States Supreme Court. I move his admission to practice before this Court for the purpose of trying this case.

The Court:
Motion granted.

Mr. Dyer:
Before the opening statements we would like to have the rule invoked as to witnesses.

The Court:
Let all witnesses retire from the Courtroom; remain near enough you will hear when your names are called.

(All witnesses then retired from the Courtroom.)

The Court:
Will you now state your claim.

(Opening statements were then made to the Court by counsel for respective parties.)

VERNON CALVIN EASON, JR., was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):
Q. What is your full name and address?
A. Vernon Calvin Eason, Jr. My home address is 322 Candia Avenue, Coral Gables, Florida.

Q. You are here under a subpoena by the plaintiff, are you not?

A. I am.

Q. What is your business?

A. I am in the insurance business.

Q. With whom?

A. Cauley & Martin. I am vice president.

Q. That is a Miami insurance company?

A. Cauley & Martin, Inc., is a Florida corporation.

Q. A very well known one, isn't it?

Mr. Batchelor:

I object to how well known they are. It is immaterial.

The Court:

Sustained.

(By Mr. Dow):

Q. Are you the agent of the Birmingham Fire Insurance Company?

A. Cauley & Martin, Inc., is the agent.

Q. You are vice president of the corporation?

A. That is right.

Q. Do you or the corporation, then, have the power to bind the Birmingham Fire Insurance Company?

A. Yes, sir.

Q. I show you a document and ask you what it is. I think that is the original.

A. It is an insurance policy.

Q. Written by whom?

A. The Birmingham Fire Insurance Company of Pennsylvania, through the American National Marine Agency, Inc., and by our agency.

Q. By yourself as agent?

A. Yes, sir.

Q. Does that insure the Motor Vessel Sea Pak for thirty thousand dollars?

Mr. Batchelor:

I object. The policy speaks for itself. We have admitted the issuance of the policy in our answer.

The Court:

Objection sustained. The policy is not in issue; the issuance of the policy is not in issue.

Mr. Batchelor:

Not the policy; it is attached to the complaint.

The Court:

Very well.

Mr. Dow:

Will you stipulate, then, Mr. Batchelor, that this is the policy which the defendant issued here on the vessel?

Mr. Batchelor:

I haven't seen the policy. If you will offer the policy which is attached to the complaint we will have no objection whatsoever.

Mr. Dow:

I think this gentleman would be the best one to recognize it.

Q. Is that it?

Mr. Batchelor:
I accept it.

Mr. Dow:
Do you accept this as the policy? The points that I made to the Court on the back I encircled in pencil so I could find them quickly. With that exception the policy is as originally given to the plaintiff.

Mr. Batchelor:
Could we just admit into evidence the copy which is attached to the complaint?

Mr. Dow:
I think the Court would find it a great deal easier to read the original of that policy than a photostat, with all of that fine print.

Mr. Batchelor:
Frankly, I object to having an exhibit put into evidence that is all marked up, underlined and encircled, certain particular parts of it.

Mr. Dow:
The parts I read to the Court are the only ones I have encircled, so I could find them quickly. I am sorry about that.

The Court:
Let the exhibit be admitted in evidence. So long as there is no alteration in the document it will be considered by the Court as though it had no interlineations.

Mr. Dow:
Will you stipulate that there are no alterations in the policy?

Mr. Batchelor:
No alterations.

(The original insurance policy was thereupon received in evidence and marked "Plaintiff's Exhibit No. 1.")

(By Mr. Dow):
Q. In placing that insurance, Mr. Eason, from whom did you get the business?

Mr. Batchelor:
I object. The policy is in evidence. We admit it covers the vessel. Where he got the business is immaterial.

The Court:
Yes, that is immaterial. Let's go straight to the heart of the controversy.

(By Mr. Dow):
Q. Did you not engage a surveyor to survey this vessel prior to the acceptance of the risk?
A. The company engaged the surveyor; we didn't.
Q. That is the Birmingham Fire Insurance Company?
A. Or the AIMA, or whoever their general agent is.
Q. Tell the Court who the AIMA is.

A. The American International Marine Agency is a marine management company that represents several companies, one of which is the Birmingham Fire Insurance Company.

Q. Mr. Stuart was the surveyor engaged?

A. He was the one so appointed.

Q. He made a report on the ship?

A. Yes, sir, he did; several.

Q. Do you have the original of those reports?

A. I do not.

Mr. Dow:

We have copies of them, as produced by the defendant.,

Q. Was the company satisfied with the report?

Mr. Batchelor:

I object as to what the company was satisfied with. He is not the company.

Mr. Dow:

He is the agent of the company.

The Court:

You mean the insurance company?

Mr. Dow:

That is correct.

The Court:

The insurance company issued the policy, didn't it?

Mr. Dow:

That is correct.

The Court:

Then, it is not material whether they were satisfied or not, is it?

Mr. Batchelor:

No, sir.

The Court:

They are bound, nevertheless. Proceed.

(By Mr. Dow):

Q. Did you subsequently arrange for the renewal of this policy?

Mr. Batchelor:

I object. They are suing on the policy which is in issue, not the renewal thereof.

Mr. Dow:

Your Honor, I would like to say I realized I would be met with this objection on this question, but I think in all matters of this kind there is always a question of good faith. I think the assured and the insurer must deal very fairly with each other. I think they should. I think the good faith here is exhibited by what I hope to bring out from the testimony of this witness.

The Court:

This is not an equity case, is it?

Mr. Dow:

No, sir.

The Court:

This is a law action, in which the rights of the parties are prescribed by the terms of the contract.

Mr. Dow:

There is another point, I think, which is important to this plaintiff, what the insurance company required if anything, for the renewal of this policy.

Mr. Batchelor:

That hasn't one thing to do with this suit. We are concerned with the policy which is in issue.

Mr. Dow:

I submit that it has a great deal to do with the defendant insurance company's view of the continuing seaworthiness of this vessel, as evidenced by what, if anything, they required for a renewal of the policy.

Mr. Batchelor:

We are getting into fields which are far afield from any issue here.

The Court:

Objection sustained.

(By Mr. Dow):

Q. Was the insurance policy which is in evidence here as Plaintiff's Exhibit No. 1—was the interest in this subsequently transferred from a Mr. Barba to the plaintiff here, Tropical Marine Products?

Mr. Batchelor:

The policy speaks for itself. It has an indorsement right on the face of it. That is what we are concerned with here.

The Court:

Very well. It should not be now disputed that this is the real party in interest.

Mr. Batchelor:

No, sir.

The Court:

Objection sustained. In other words, the plaintiff here is the real party in interest under this contract.

Mr. Batchelor:

Yes, sir.

The Court:

That is the test.

Mr. Dow:

I think where the face of it refers to someone else it would be helpful if I brought that out.

Q. Did you eventually receive a notice of loss of the ship?

A. Yes, sir.

Q. Was that in due form as required by your company?

A. Yes, sir, ultimately. We were first advised by telephone, and then ultimately the proper forms were submitted.

Q. Did your company pay the loss to this plaintiff?

A. To the best of my knowledge, no.

Q. Do you know any reason why it should not be paid?

Mr. Batchelor:
I object, as immaterial.

The Court:
His reason would not control. The reason we would find here from the evidence and the law would be the controlling reason why it was not or should not be done.

Mr. Batchelor:
Yes, sir.

The Court:
Very well. Objection sustained.

Mr. Dow:
Your witness.

Mr. Batchelor:
No questions.

(Witness excused.)

THOMAS A. BARBA, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):
Q. Will you state your full name and address to the Court?
A. Thomas A. Barba, 7970 Hawthorne Avenue, Miami Beach.

Q. What is your business?
A. Builder.
Q. I beg your pardon?
A. Builder.
Q. What kind of a builder?
A. General; general contractor.
Q. You build ships, too?
A. No.
Q. Were you at one time the owner of the Sea Pak?
A. Yes.
Q. Did you originally establish a fishing business down by Caicos?
A. Yes, sir.
Q. Will you tell the Court, in your own words, as simply and as quickly as you can, the business that you built, how you built it, how the business went, the circumstances surrounding the building of the Sea Pak, what difference, if any, she made in your business, and then—I underhtand you subsequently sold it to the Tropical Marine Products; is that correct?
A. That is right.
Q. Start with the beginning of this business down there, and tell the Court about it.

Mr. Batchelor:

We object. That has not one thing to do with the issues in this case. What happened to this business he had started and what it did is not material in the least bit to the issue in this case. We are trying to decide what caused this boat to sink.

The Court:

The Court doesn't see any relevancy in the inquiry. Your case here is, as I understand it, the claim for

the full amount of the policy of insurance on account of the loss of the ship that was insured, because of the hazards insured against, or because of the happening of a hazard that was covered by the policy. It makes no difference whether this witness was successful in his business or not. The issue here is what caused the loss of the ship. That is practically the only issue, isn't it?

Mr. Batchelor:
Yes, sir.

Mr. Dow:
Your Honor, it is getting down to the very time of the beginning of the trial.

The Court:
Objection sustained. Any further examination of this witness?

Mr. Dow:
Are you asking me the question?

The Court:
Yes.

Mr. Dow:
You are telling me that the objection is sustained, so you are not really asking me a question.

The Court:
I want to know if you want to ask this witness any other questions except the one you have just asked him.

Mr. Dow:
No.

The Court:
Let the witness be excused.

(Witness excused.)

The Court:
Call the next witness.

JAMES P. STUART, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):
Q. Will you state your full name and address?
A. James P. Stuart, 922 Ingraham Building.
Q. What is your business?
A. Marine surveyor.
Q. How long have you been engaged in that business?
A. I have been working as a surveyor since '28.
Q. How long have you been in the ship or boat construction business, or related to it?
A. Since 1906.

Mr. Batchelor:
We are willing to concede Mr. Stuart's qualifications.

Mr. Dow:
The Court might be interested in it. I don't know.

The Court:
I think Mr. Stuart has been a witness in here before. Haven't you?

The Witness:
Yes, sir, I think I have.

The Court:
Go ahead. I think I know something about his qualifications. Proceed.

Mr. Dow:
Will you accept them?

The Court:
Yes, of course.

(By Mr. Dow):
Q. You are appearing here under a subpoena, are you not?
A. Yes, sir.
Q. Were you at one time called in by the Birmingham Fire Insurance Company, or their agents here in Miami, to examine a certain vessel then under reconstruction, whose name subsequently became the Sea Pak?
A. Yes, sir.
Q. Would you tell the Court what you found, what you required, what you did, and in the end the qualifications of the vessel on which you issued your certificate? Just tell the Court.

Mr. Dow:

Your Honor, this will take a few minutes. If Your Honor doesn't wish to hear it or if there is going to be an objection to it, I will just take the certificate. What is your pleasure, Mr. Batchelor?

Mr. Batchelor:

Since you have asked us, I will tell the Court I am not going to object to Mr. Stuart's testimony, since this case is being tried without a jury, but I don't think the conditions at the time the policy was issued are material, but since Your Honor might want to hear it, we have no objection to Mr. Stuart testifying.

The Court:

Proceed.

(By Mr. Dow):

Q. Tell the Court what you did, what you required, what you found, and the kind of ship you produced in the end; just tell the Court.

A. You want that from memory, or do you want that from the survey?

Q. Do you have your surveys here?

A. Yes, sir.

Q. Use that to refresh your recollection. Is that your own copy?

A. Yes, sir.

Mr. Dow:

Do we have the original? Mr. Batchelor, do you have the original?

Mr. Batchelor:

Not that I know of.

ENDORSEMENT

[redacted] November 10th, 19 53

Effective November 10, 1953, it is understood and agreed that title to vessel insured hereunder is now vested in:

[redacted]
310 S. E. 2nd Avenue
Miami, Florida

It is further understood and agreed that, loss if any under this policy, shall be payable to the insured and T. A. Barba as their interest may appear.

All other terms and conditions remaining unchanged.

Attached to and forming part of Policy No. [redacted] of the [redacted] Insurance Company

Issued to: T. A. Barba

AIMA

WARRANTY ENDORSEMENT

To be used when name of insured is changed and provision has been financed by the First National Bank of Miami, Florida. A copy, signed by the agent, must be forwarded to the Bank.

Address 1970 Northeast 2nd Ave., Miami TITLE ENDORSEMENT Expiration Date August 14, 1954

Attached to and forming part of Policy No. [redacted] of the

BIRMINGHAM FIRE INSURANCE COMPANY of PENNSYLVANIA

issued at its Miami, Florida STATE Agency.

Date of Endorsement November 10, 1953 Agent.

Name of Insured T. A. BARBA

This endorsement may be used to, (1) authorize a change of ownership, (2) add a mortgagee, (3) eliminate a mortgagee or, (4) change a mortgagee. Only such of the following provisions are applicable as have been completed by the insertion of name in the blanks provided therefor:

1. Subject to the rights of THE FIRST NATIONAL BANK OF MIAMI, FLORIDA, under an agreement with the original assured herein whereby said Bank has financed the premiums on this policy, it is hereby acknowledged and agreed that the interest of the above Insured in the property described in this policy has been transferred and this policy assigned to Tropical Marine Products, Inc., 310 S. E. Second Avenue, Miami, Florida, and consent to such assignment is granted by the Company.

ELIMINATION OF PRIOR MORTGAGEE (TRUSTEE) INTEREST

2. The interest of , as mortgagees (or trustees), in this policy is hereby eliminated.

MORTGAGEE CLAUSE

Loss, if any, under this policy, shall be payable, to the insured and T. A. Barba, as their interests may appear. (Name and Address)

first mortgagee (or trustee), and to (Name and Address)

second mortgagee as interest may appear, subject to provisions of the mortgagee clause appearing on the reverse side of this form.

LO 103 REV.

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2

Mortgagee Clause (This entire clause is void unless name of mortgagee or trustee is inserted on reverse side in space provided)—Loss, if any on **building** items under this policy, shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, That in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.

The above Mortgagee Clause DOES NOT apply to personal property.*

*NOTE TO AGENTS—This line (*) must be voided when clause is made applicable to personal property

AMERICAN INSTITUTE
TIME—HULLS
Deductible Average Clause
(March 1945)

Attached to and forming part of Policy No. 26132 on "SEA PAK"

Anything herein to the contrary notwithstanding, this insurance is warranted free from all claims of whatsoever nature (including claims under the sue and labor clause and claims under the collision clause) unless the accident results in a total loss and/or constructive total loss of the vessel (in which case this clause shall not apply) or unless the aggregate of such claims arising out of each separate accident exceeds $ 500.00, in which case this insurance shall be liable only for the amount by which such aggregate exceeds $ 500.00; but a recovery from other interests and/or parties shall not operate to exclude claims under this insurance provided the aggregate of such claims arising out of one separate accident if unreduced by such recovery amounts to $ 500.00 For the purpose of this clause each accident shall be treated separately, but it is agreed (a) that a sequence of damages arising from the same accident shall be treated as due to that accident, and (b) that all heavy weather damage which occurs during a single sea passage between two ports shall be treated as though due to one accident.

Approved by the
TIME BOILER
December 1951

To be attached to and form a part of Policy No. 26132 of the Birmingham Fire Insurance Company of Pennsylvania

Insuring T. A. BARBA

FOR ACCOUNT OF Whom it may concern

but subject to the provisions of this Policy with respect to change of ownership.

In the event of any change, voluntary or otherwise, in the ownership of the Vessel or if the Vessel be placed under new managment or be chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from time of such change in ownership or management, charter or requisition; provided, however, that in the case of an involuntary temporary transfer by requisition or otherwise, without the prior execution of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the Vessel, and if a loss payable hereunder should occur between such transfer and such cancellation the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason of such transfer, in respect of all or part of such loss as is recoverable from the transferee and in the proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of change in ownership or management, charter or requisition shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, (excepting claims required to be paid to others under the Collision Clause), payable to Insured

.....or order.

Sum Insured Hereunder Thirty Thousand and No/100 - Dollars,

at and from the 14th day of August 1953 Noon, Eastern Standard time

to the 14th day of August 1954 Noon, Eastern Standard time,

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

On the Vessel called the Refrigerated Vessel "SEA PAK" ON: Hull & Machinery

(or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture	$ - - - - - - - - - -	
Boilers, machinery, refrigerating machinery and insulation, motor generators and other electrical machinery, and everything connected therewith	$ - - - - - - - - - -	$ 30,000.00

Donkey boilers, winches, cranes, windlasses and steering gear shall be deemed to be a part of the hull and not of the machinery.

Special Conditions and Warranties:

NAVIGATION LIMITS:
Warranted confined to inland and coastal waters of the Bahamas, with occasional trips to the Florida East Coast for repairs.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

The Underwriters to be paid in consideration of this insurance One Thousand Nine Hundred Fifty and No/100 - ($1950.) Dollars being at the rate of 6½ per cent.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured. Such proportion of the premium, however, as shall have been earned up to the time of such cancellation shall be due and payable; but in the event of Total or Constructive Total Loss occurring prior to cancellation full annual premium shall be deemed earned.

46.04 cents per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy.

As follows for each consecutive 30 days the Vessel may be laid up in port, viz:—

To return	Without Cargo on Board	With Cargo on Board	
1. Under repair	- - - - - ¢% net	- - - - ¢% net	and arrival.
2. Not under repair	40.63 ¢% net	- - - - ¢% net	

For the purpose of this clause a Vessel loading or discharging cargo shall be considered as "with cargo on board".

Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.

(b) that in the event of a return for special trade, or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching hereto bear to thirty.

(Continued On Following Page)

Additional insurances are permitted:

(a) DISBURSEMENTS, MANAGERS' COMMISSIONS, PROFIT OR EXCESS OVER INSURED VALUE OF HULL AND MACHINERY AND/OR SIMILAR INTERESTS HOWEVER DESCRIBED, AND FREIGHT (INCLUDING CHARTERED FREIGHT) OR ANTICIPATED FREIGHT NOT INSURED FOR TIME. A sum not exceeding in the aggregate 25% of the insured value of the Vessel.

(b) FREIGHT OR HIRE, UNDER CONTRACTS FOR VOYAGE. A sum not exceeding the gross freight or hire for the current cargo passage and next succeeding cargo passage (such insurance to include, if required, a preliminary and an intermediate ballast passage) plus the charges of insurance. In the case of a voyage charter where payment is made on a time basis, the sum permitted for insurance shall be calculated on the estimated duration of the voyage, subject to the limitation of two cargo passages as laid down herein. Any sum insured under this Section shall be reduced as the freight or hire is earned by the gross amount so earned.

(c) ANTICIPATED FREIGHT IF THE VESSEL SAILS IN BALLAST AND NOT UNDER CHARTER. A sum not exceeding the anticipated gross freight on next cargo passage, such sum to be reasonably estimated on the basis of the current rate of freight at time of insurance, plus the charges of insurance. Provided, however, that no insurance shall be permitted under this Section if any insurance is effected under Section (b).

(d) TIME CHARTER HIRE OR CHARTER HIRE FOR SERIES OF VOYAGES. A sum not exceeding 50% of the gross hire which is to be earned under the charter in a period not exceeding 18 months. Any sum insured under this Section shall be reduced as the hire is earned under the charter by 50% of the gross amount so earned but where the charter is for a period exceeding 18 months the sum insured need not be reduced while it does not exceed 50% of the gross hire still to be earned under the charter. An insurance under this Section may begin on the signing of the charter.

(e) PREMIUMS. A sum not exceeding the actual premiums of all interests insured for a period not exceeding 12 months (excluding premiums insured under the foregoing Sections but including, if required, the premium or estimated calls on any Protection and Indemnity or War &c. Risk insurance) reducing pro rata monthly.

(f) RETURNS OF PREMIUM. A sum not exceeding the actual returns which are recoverable subject to and arrival under any policy of insurance.

(g) INSURANCE IRRESPECTIVE OF AMOUNT AGAINST: — Risks excluded by the F. C. & S. Clause, and risks enumerated in the American Institute War and Strikes Clauses and General Average and Salvage Disbursements.

Warranted that no insurance on any interests enumerated in the foregoing Sections (a) to (f), inclusive, in excess of the amounts permitted therein and no insurance subject to P.P.I., F.I.A. or other like term, on any interests whatever excepting those enumerated in Section (a), is or shall be effected to operate during the currency of this Policy by or for account of the Assured, Owners, Managers or Mortgagees. Provided always that a breach of this warranty shall not afford Underwriters any defense to a claim by a Mortgagee who has accepted this Policy without knowledge of such breach.

Beginning the adventure upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall notify Underwriters immediately and pay an additional premium if required but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise.

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportions as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

Contact with Aircraft or with any land conveyance;

Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage. In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or pro rata for part of a day from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval.

No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses;

for the period covered by the tender allowance or any part thereof.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850., but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after standing shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

The warranty and conditions as to Average under 3 per cent or unless amounting to $4,850. to be applicable to each voyage as if separately insured, and a voyage shall commence at the Assured's election when the Vessel either begins to load cargo or sails in ballast to a loading port. Such voyage shall continue until the Vessel has made not more than three passages or not more than two passages with cargo (whichever first occurs) and extend further until the Vessel thereafter begins to load cargo or sails (whichever first occurs), but such extension shall not exceed 30 days in port. A passage shall be deemed to be from the commencement of loading at the first port or place of loading until completion of discharge at the last port or place of discharge, or, if the Vessel sails in ballast, from the port or place of departure until arrival at the first port or place thereafter other than a port or place of refuge or a port or place for bunkering only. Each period in port of 30 days in excess of 30 days between passages shall itself constitute a passage for the purposes of this clause. When the Vessel sails in ballast to effect damage repairs such sailing or passage shall be considered part of the previous passage. In calculating whether the 3 per cent. or $4,850. is reached, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring within such period, providing it occur on the same voyage as above defined, but only that portion of the claim arising within the period covered by this Policy shall be recoverable hereon. A voyage shall not be so fixed that it overlaps another voyage on which a claim is made on this or the preceding or succeeding Policy. Particular Average which would be excluded by the terms of this Policy shall not be included in determining whether the 3 per cent. or $4,850. is reached.

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

F. C. & S. CLAUSE

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of any attempt thereat, or any threat thereof; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not); but the foregoing shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo); stranding, heavy weather or which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) if a hostile act by or against a belligerent power, and for the or air forces in association with a power; also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employ Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent an

[redacted] FIRE INSURANCE COMPANY
OF
[redacted]
(INCORPORATED 1871)

C O P Y

AMERICAN INTERNATIONAL MARINE AGENCY OF NEW YORK, INC.

[redacted]

Printed in U.S.A.

6

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY:—This Policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

BIRMINGHAM FIRE INSURANCE COMPANY

OF PENNSYLVANIA

INTERNATIONAL MARINE

100 MAIDEN LANE NEW YORK 5

SP 13

ENT

May 11, 56

In consideration of a premium of $111.36 it is hereby understood and agreed that Hull [illegible], in the amount of $30,000, is reinstated effective May 3, 1954, with no change.

Insd #16577
5/11/54
nb

All other terms and conditions remain unchanged.

Attached to and forming part of Policy No. 20132

BIRMINGHAM FIRE INSURANCE COMPANY

[illegible]

for hospital, medical, or other expenses necessarily and reasonably incurred for injury to, or illness of any member of the crew of the vessel named herein or any other person (excluding it shall also include burial expenses not exceeding Two Hundred ($200) Dollars, when necessarily and be incurred by the Assured for the burial of any seaman of said vessel.

for repatriation expenses of any member of the crew of the vessel named herein, necessarily and reasonably under statutory obligation, excepting such expenses as arise out of or ensue from the termination prematurely in accordance with the terms thereof, or by mutual consent, or by sale of the said vessel or by act of the Assured. Wages shall be included in such expenses when payable under statutory obligation, unemployment due to the wreck or loss of the said vessel.

[illegible] property on such other vessel or craft, caused by collision with the vessel named herein, to the extent such liability would not be covered by claims under the American Institute Time (Hulls) December 1, 1930 Form

(including the four fourths running-down clause)

as under this clause shall be settled on the principle of cross liabilities to the same extent only as provided by the four fourths running-down clause above mentioned.

as under this clause shall be divided among the several classes of claims enumerated in this policy and each class shall be subject to the deduction and special conditions applicable in respect of such class.

Notwithstanding the foregoing, if any one or more of the various liabilities arising from such collision has been admitted, settled or adjusted without the written consent of the Assurer, the Assurer shall be relieved of liability for any and all claims under this clause.

for loss of or damage to any other vessel or craft, or to property on such other vessel or craft, not covered by the provided such liability does not arise by reason of a contract made by the assured.

as may be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the shall be liable as if such damaged property belonged to another, but only for the excess over any recoverable under any other insurance applicable on the property.

[illegible] damage to any dock, pier, harbor, bridge, jetty, buoy, lighthouse, breakwater, structure, [illegible], cable, [illegible] or movable object or property whatsoever, except another vessel or craft, or property on another [illegible]

[illegible] provided by a valid claim hereunder but for the fact that the [illegible]

EXHIBIT 4

[redacted]
Miami, Florida

INSURANCE PREMIUM CONTRACT

[redacted]

(All features named in the policy should be included)

[redacted] entitled Vessel "[redacted]"

(Name) (Address)

Insurance Company.	Premium	Amount & Kind of Insurance	Date	Expiration
[redacted] Insurance Company	$1,950.00	$30,000 Hull and Machinery	8/24/53	8/24/54

Premium / $ 1,950.00

Payment: / $ 585.00

OF PREMIUM: / $ 1,365.00

+2.75 / $ 30.76

CONTRACT: / $ 1,395.76

PAYMENT SCHEDULE

All payments are to be made direct to the bank.

in annual

ments as shown below:

Amount

$ _____

$ _____

$ _____

$ _____

able 8 monthly installments

$174.47

beginning 9/14/53

THE FIRST NATIONAL BANK OF MIAMI
PAID
APR 1954
DEPT.
MIAMI, FLA.

For value received, the undersigned assured promises to pay to the order of THE FIRST NATIONAL BANK OF MIAMI at its offices in Miami, Florida ONE THOUSAND THREE HUNDRED NINETY-FIVE AND * * * * * * * * * * * 76/100 Dollars in installments as outlined in the PAYMENT SCHEDULE set forth herein.

1. The assured authorizes the bank to pay the amount of the premium (after down payment) to the insurance company.

2. The assured represents that he has paid or obligated himself to pay the down payment to the insurance company.

3. It is warranted that the assured actually ordered the insurance described and receipt of the policy is acknowledged.

4. As security for the indebtedness evidenced hereby the assured assigns to the bank any and all sums which may be or become payable to him under or on account of said policy, including:

(a) Any return premium which may become due under the policy whether from cancellation or otherwise; and

(b) Any payment on account of loss under the policy. Provided, however, that the rights of a mortgagee shall not be affected thereby.

5. Any such sums shall be applied by the bank as received, [redacted] reduction of the notes hereunder, but the assured shall [redacted]

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Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

Contact with Aircraft or with any land conveyance;

Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage. In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or pro rata for part of a day from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval.

No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses;

for the period covered by the tender allowance or any part thereof.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850., but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

~~The warranty and conditions as to Average under 3 per cent. or unless amounting to $4,850. to be applicable to each~~ voyage as if separately insured, and a voyage shall commence at the Assured's election when the Vessel either begins to load cargo or sails in ballast to a loading port. Such voyage shall continue until the Vessel has made not more than three passages or not more than two passages with cargo (whichever first occurs) and extend further until the Vessel thereafter begins to load cargo or sails (whichever first occurs), but such extension shall not exceed 30 days in port. A passage shall be deemed to be from the commencement of loading at the first port or place of loading until completion of discharge at the last port or place of discharge, or, if the Vessel sails in ballast, from the port or place of departure until arrival at the first port or place thereafter other than a port or place of refuge or a port or place for bunkering only. Each period in port of 30 days in excess of 30 days between passages shall itself constitute a passage for the purposes of this clause. When the Vessel sails in ballast to effect damage repairs such sailing or passage shall be considered part of the previous passage. In calculating whether the 3 per cent. or $4,850. is reached, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring within such period, providing it occur on the same voyage as above defined, but only that portion of the claim arising within the period covered by this Policy shall be recoverable hereon. A voyage shall not be so fixed that it overlaps another voyage on which a claim is made on this or the preceding or succeeding Policy. Particular Average which would be excluded by ~~the terms of this Policy shall not be included in determining whether the 3 per cent. or $4,850. is reached.~~

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the period covered by this Policy.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Vessel hereby insurd by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

In the event of expenditure under the Sue and Labor Clause, this Policy shall pay the proportion of such expenses that the amount insured hereunder bears to the insured value of the Vessel, or that the amount insured hereunder, less loss and/or damage payable under this Policy, bears to the actual value of the salved property; whichever proportion shall be less.

If claim for total loss is admitted under this Policy and sue and labor expenses have been reasonably incurred in excess of any proceeds realized or value recovered, the amount payable under this Policy will be the proportion of such excess that the amount insured hereunder (without deduction for loss or damage) bears to the insured value or the sound value of the Vessel at the time of the accident, whichever value was greater.

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers or the Surety in consequence of the insured Vessel being at fault shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters will pay the Assured, or the Charterers, or the Surety, whichever shall have paid, such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect to any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of Hull Underwriters, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured, or the Charterers, or the Surety, may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, structures, or any other objects (excepting other Vessels and property thereon), consequent on such collision, or in respect of the cargo, baggage or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim under this clause being made by anyone other than the Owners of the Vessel hereby insured, he shall not be entitled to recover in respect of any liability to which the Owners of the Vessel as such would not be subject, nor to a greater extent than the Owners would be entitled in such event to recover.

The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

ing warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not) but this warranty shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service of the Vessel) by a hostile act by or against a belligerent power, and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in connection with the Vessel. Also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employing atomic fission or radioactive force.

The above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

[illegible] other loan to the unpresent surplus.

6. The assured acknowledges receipt of a copy of this instrument and waives notice of the [illegible] installments. Default in the payment of any installment when due shall render the balance [illegible] and interest due and payable with interest on both from date of default at the legal rate. [illegible] days shall constitute an election by the assured to cancel the policy. The bank [illegible] the insurance company of such cancellation so that the return premiums might promptly [illegible] the bank shall receive from the insurance company all return or unearned premiums [illegible] above mentioned. In the event of cancellation the bank shall be under no duty to [illegible] unless it actually has the same in its possession.

7. The assured appoints the bank as attorney-in-fact to collect and receive all returns or unearned premiums, as set forth herein, and to execute any necessary instruments to release and acquit the insurance company.

8. In the event it becomes necessary to collect any sums due hereinunder by law the party or parties liable thereby shall pay all expenses for the enforcement hereof, including reasonable attorney's fees whether the bank is obligated therefor or not.

9. The agent soliciting or writing the insurance is not the agent of the bank, and has no authority to bind the bank in any wise.

10. This agreement shall be construed as a Florida contract

PLEASE NOTIFY:
[illegible] Fire Insurance Company
c/o John E. McKinley, Inc.
[illegible] duPont Building
[illegible] 32, Florida

THE FIRST NATIONAL BANK OF MIAMI

APPROVED BY: _____
AUTHORIZED SIGNATURE

Mail Address 1970 Hawthorne Avenue

Miami Beach, Florida

[illegible] 23

[illegible] 14, 1953

SOLICITING AGENT'S CERTIFICATE

The agent of the insurance company soliciting or writing the policies described [illegible] the bank, (1) that his signature to such policies is authorized by the insurance company [illegible] are the lawful and binding obligations of the insurance company in whose name [illegible] that the assured has read the within contract on which this endorsement is made [illegible] thereof and that there were made to him no representations not contained [illegible] the insurance covered by this agreement that the policies [illegible] has collected the required double payment or reserve [illegible] that he will immediately notify the bank at the [illegible] thereon that may affect the security of the [illegible] to the policies [illegible]

Agent

[redacted]

[redacted] Policy 36132 - Tropical Marine Products, [redacted] August 2, 1954.

[redacted] you kindly prepare and forward renewal of the captioned policy [redacted] August 14, 1954. This policy provides $10,000 Hull [redacted] coverage on the refrigerated vessel "SEA MIX."

Mr. Dow:
Has the defendant got the original? We asked for it. I think we were given a photostat, were we not?

Mr. Willner:
The defendant produced a photostat.

Mr. Batchelor:
I think you produced a carbon copy of the original.

Mr. Dyer:
There is no question about it, is there?

Mr. Dow:
The Court might like to see it.

Mr. Dyer:
It contains a good deal, I think, of irrelevant information.

The Court:
I think he is going to give it now, isn't he? Go ahead with your testimony.

Mr. Dow:
Yes, sir.

The Witness:
The hull was checked. A lot of new planks were put in the ship. The caulking was re-caulked. The engines were completely overhauled, and copper exhaust pipes renewed for both engines. The batteries were put in lead boxes. The fuel pumps were put in order. The wiring was rechecked throughout. The C02 system was checked throughout. All connections

forward were plugged off and were taken out and new planks put in. There were two seacocks aft. They were left there, but they were plugged up. Her stuffing boxes were checked and repacked. The vessel was completely overhauled to my satisfaction.

(By Mr. Dow):

Q. Nothing else remained to be done that you wanted done; is that correct?

A. Yes, sir, except a trial trip. A trial trip was run.

Q. Did you go aboard on the trial trip?

A. No, sir, I didn't.

Q. You accepted the results of someone else's opinion on the trial trip?

A. Mr. Berlinski did. He was going down in the ship.

Q. Have you confidence in Mr. Berlinski?

A. Yes, sir, I have.

Q. You showed the certificate and all of this to the insurance company?

A. Yes, sir.

Q. Did you give an opinion of the value before she left?

A. Thirty thousand dollars. The replacement value sixty thousand.

Q. May I glance at that a minute?

A. Yes, sir.

Mr. Dow:

Mr. Willner, do you have our copy?

Mr. Willner:

It is in the file.

Mr. Dow:

Your Honor, I offer in evidence a certified copy of Mr. Stuart's report, consisting of three pages, as Plaintiff's Exhibit No. 2.

Mr. Batchelor:

We object to it as immaterial. The witness is here in person, and testified as to his opinion.

The Court:

Hasn't the witness covered all the substantial questions involved in this particular inquiry?

Mr. Dow:

I think he has, except one or two.

The Court:

I think it is unnecessary and would encumber the record. Objection sustained.

(By Mr Dow):

Q. Were you called in by the insurance company to make any investigation after the loss?

Mr. Batchelor:

I object, as immaterial.

The Court:

What is the purpose of that inquiry, Counsel?

Mr. Dow:

The purpose of the inquiry, Your Honor, is to point out after the loss the defendant, instead of employing its own surveyor, who was probably one of the most competent men on the east coast—that includes New

York as well—calls in another hurveyor who never saw the ship or had nothing to do with her in any official capacity, and who never consulted Mr. Stuart.

The Court:
This witness was not called in; is that right?

Mr. Dow:
That is right.

The Court:
That is a negative question. Objection sustained.

Mr. Dow:
Thank you very much, Mr. Stuart. That is all.

Cross Examination.

(By Mr. Batchelor):
Q. Can you tell us the date, approximately the date, when you surveyed the vessel here in Miami that you have just told us about?

Mr. Dow:
Objection. That is the purpose of the offer of the report. All of that is contained in here.

The Court:
Objection overruled. The date?

The Witness:
It was around July 21st. I wrote a letter July 21st, 1953.

(By Mr. Batchelor):

Q. Is that the approximate date when these inspections took place?

A. That is when I wrote the letter to the insurance company about the vessel's business or what trade she was going into. The final survey was—the preliminary survey was written July 21st, 1953.

Q. I take it, then, that your inspection of the vessel, that you have told us about, took place prior to July 21st, of 1953?

A. Yes, sir, it did.

Q. You never saw the vessel after that time, or that approximate time?

A. On August 11th I wrote the company, saying all recommendations were being complied with and she was going on her trial trip, she was leaving if the trial trip was successful.

Q. Do you have any recollection of ever having seen the vessel again after that date?

A. No, sir; I never saw the vessel after that date.

Q. That is August 11th, 1953?

A. Yes, sir.

Q. Now, Mr. Stuart, assume that the Sea Pak had not been aground after you last saw her or had been in any accidents since you last inspected her in August of 1953, do you feel, based upon your experience in the marine field, that condition which you saw her bottom in in 1953 would permit you to express any opinion as to the seaworthiness of her bottom a year later, in August of 1954?

Mr. Dow:

Objection. That is entirely irrelevant.

Mr. Batchelor:

The boat sank—

The Court:
The question is whether he feels that he is qualified to express an opinion, isn't it?

Mr. Batchelor:
Yes, sir.

The Court:
It is not an inquiry along the line of whether he is an expert here.

Mr. Dow:
If that is the question, I withdraw my objection.

Mr. Batchelor:
I didn't ask him to express an opinion. I asked him if he felt he could express an opinion.

The Court:
I understand.

Mr. Dow:
I withdraw my objection.

(By Mr. Batchelor):
Q. Proceed, Mr. Stuart. Would you care for the question to be read to you?

The Court:
He may not understand that. It has a peculiar legal meaning that he may not be familiar with. However, it is a factual matter you have asked him.

Mr. Batchelor:
Read the question.

(The pending question was thereupon read by the reporter.)

(By Mr. Batchelor):

Q. If you don't understand it, I will be glad to rephrase it.

The Court:

Counsel, do you think that is a qualifying question? That has to do with the very thing that we have under investigation here. This witness has heretofore in this Court, and offered to here, given us testimony as to his experience in this particular field. Do you want to have him express an opinion about whether the bottom of this ship was likely to, well, let us say, spring a leak without any hazard having intervened, or the contrary? Hadn't you better inquire into his knowledge of the cause of this accident, what would be the effect, and that sort of thing? As I understand it, Mr. Stuart, you are a surveyor, a marine surveyor; is that the correct title?

The Witness:

Yes, sir.

The Court:

As such, you have peculiar knowledge with reference to the seaworthiness of a vessel, such as the one involved in this case?

The Witness:

Yes, sir.

The Court:

I take it you have some experience in analyzing losses of ships that were sunk on account of some defect in the hull or something that happened to the hull which caused water to get in and the ship to go down?

The Witness:

Yes, sir.

The Court:

I assume further that you could tell us about what was necessary to forestall that sort of thing?

The Witness:

Yes, sir.

The Court:

It might be well if you would give us briefly what experience you have had in actually examining cases of that kind and your knowledge bearing on that particular thing, your experience or your accumulated experience in connection with leaks that occurred in the hull of a vessel that caused it to go down, and likely what causes that to happen, with particular reference to the ship in this case, which you inspected. I assume you inspected the hull?

The Witness:

Yes, sir.

The Court:

You made a careful examination of the hull?

The Witness:
Yes, sir.

The Court:
The construction of it?

The Witness:
Yes, sir.

The Court:
You might see fit to examine the witness along that line, prima faciely to establish his standing as an expert.

Mr. Batchelor:
We prefer to waive further examination of Mr. Stuart at this time. If we see fit we will call him later as our witness.

The Court:
Very well.

Mr. Dow:
I will concede that Mr. Stuart is one of the ablest surveyors in the east with respect to the very thing that Your Honor was directing his questions to.

The Court:
Would you have any objection to opposing counsel asking for his opinion about what caused this leak or caused the ship to sink?

Mr. Dow:
No, sir. Anything that Mr. Stuart wishes to testify to I would not object to.

The Court:
Then, the capacity of this witness as an expert has been admitted by opposing counsel. Do you want to pursue your question?

Mr. Batchelor:
We prefer to wait and call him as our witness.

The Court:
Very well.

Mr. Batchelor:
We would like to have him remain under the subpoena.

The Court:
Very well.

(Witness excused.)

STUART N. WILLNER, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):
Q. Will you give your full name and address to the Court, please?
A. Stuart N. Willner, 3 Sidonia Avenue, Coral Gables, Florida.
Q. What is your business?
A. I am in the fishing business in South Caicos, British West Indies.

Q. Did you purchase the business from Mr. Barba?
A. That is correct.

Mr. Dow:
If I am leading him, Mr. Batchelor, it is only in the interest of saving time.

Q. Did you pay for it?

Mr. Batchelor:
I object whether he paid for it or not.

(By Mr. Dow):
Q. Did you owe Mr. Barba any money?

Mr. Batchelor:
I object.

Mr. Dow:
Was that sustained?

The Court:
I haven't ruled on it. It is not in issue here. The whole question here is what caused the boat to sink. It did sink, evidently; nobody denies that. It was insured for thirty thousand dollars. Nobody denies that. What we have got to find out here is what caused it to sink, then we will try to see whether or not that cause is covered by the policy, and if it is the defendant, the insurance company, is bound to pay, regardless of what it cost him. If pursuant to some reason other than a reason covered by the policy, no matter what it cost him, he can't recover.

Mr. Dow:

Will you, counsel for the defense here, concede, so that I will know where I am going, and I can avoid questions which tend to support our point—will you concede that there is no question whatsoever on the part of the insurance company that there was any deliberateness on the part of the plaintiff in the loss of the vessel?

Mr. Batchelor:

Any what?

Mr. Dow:

That there was no deliberateness.

Mr. Batchelor:

I understood the issues were made by the pleadings, and there is no plea of that type in the file that I know of.

Mr. Dow:

I don't understand the answer. I never have, clearly. To say it is not a loss covered under the policy could impute dishonesty to the plaintiff; it would impute lack of good care; it could impute lack of due diligence on the part of the owner in seeing that the captains were supplied with whatever they needed, or asked for, rather. It may impute that, or that we would have to prove exactly, deeper than any man has ever gone alive and come back, what it was that caused the ship to sink. It may impute most anything to just use that particular general term. All I am trying to do, and have been from the beginning, is to get the defendant to narrow it down, tell me exactly what they are complaining of, so I can confine my proof to that.

Mr. Batchelor:

Our answer is very simple. It covers less than a page. It denies the material allegations of the complaint, which say the boat was lost because of perils of the sea.

Mr. Dow:

That is what I mean. The perils of the sea, as the Courts have said, are indefinite and could be anything.

The Court:

If the proof were of that character here you will have the defendant—well, I shouldn't say behind the 8-ball, but you will have the defendant scurrying for proof to the contrary, I expect.

Mr. Dow:

You see, we admit that under the cases we don't have to show exactly what caused her to go down. All we have to show is that we insured her; her seaworthiness was admitted by the defendant at the time the policy attached; the seaworthiness presumably continued: arrangements were made to re-insure her on the same terms and for the same premium; suddenly she went down. I wish I knew why, for sure.

The Court:

Nevertheless, the burden is on you to establish the case, isn't it?

Mr. Dow:

The only thing I have to establish is she sank.

The Court:

Is that all?

Mr. Dow:
Yes, sir.

Mr. Batchelor:
If Mr. Dow thinks that is all he has to establish we will agree she sank and he can rest his case.

Mr. Dow:
Getting back to the request for a stipulation in the beginning, will you agree that the Court may determine from Captain Mills' testimony, if you like, as it is in the deposition that has already been taken, as far as he knows she sank. If you will agree that that is it, that she sank, then it becomes a question of law, as I said before, which the Court has got to decide, anyway. It already has our brief on the law. I don't wish to debate it with counsel. Will you stipulate to that now?

Mr. Batchelor:
We will stipulate to one fact, that the boat sank. Any other fact will have to be introduced in an orderly fashion.

Mr. Dow:
I am still somewhat at sea, and I don't know whether I am afloat or not. I presume I am to continue.

The Court:
I suppose so.

(By Mr. Dow):
Q. Did you owe Mr. Barba any money?

Mr. Batchelor:
To which we objected.

The Court:
I think that is immaterial. Whatever he owed, if anything, would not make any difference. If the loss of the ship was on account of the hazards mentioned in the policy he would be entitled to recover the full amount of the policy.

Mr. Dow:
I have had a good deal of experience in trying just these cases. I often find that much is often made of business relations, which might indicate that the vessel owner needed some fast money, leaving the slightest implication that perhaps he cast her away. That is why, unless the defendant will come clean with me on this thing, I am trying to protect my clients on those points, however irrelevant they may appear at the time.

The Court:
That is not even intimated in the pleadings.

Mr. Batchelor:
No, sir.

The Court:
Has there been any plea, affirmative plea, that this ship was sunk deliberately or that there is any fraud in this case?

Mr. Batchelor:
There is nothing in our answer on that.

Mr. Dow:

What is your answer?

Mr. Batchelor:

There is nothing in our answer on that phase of the case at all.

The Court:

I think you should go ahead with your case here and prove the circumstances under which this boat sank. I think, of course, your testimony on the condition of the ship, when it went to sea it was in good condition, that there was no apparent reason for it to spring a leak and become full of water and sink, that would be a circumstance, a reasonable inference that it might have been caused by coming in contact with something under the water, we will say, and it made a hole in it, or for some other reason. Aren't you going to have to establish some set of circumstances, if you have no direct proof, that would raise a reasonable conclusion that the ship sank by one of those perils of the sea which are specified in the policy or by law is included in the policy?

Mr. Dow:

That is a matter of law in the interpretation of the policy, which is for the Court. Our position on that is in our brief, our trial memorandum. But I cannot see how the defendant here can be so vague as to its defense at one time, so broad and so general, and then won't agree to such a simple stipulation as I was willing to make in the beginning. I have got to cover every possible contingency with such a broad, general defense that it does not come under the policy. A lot of things don't come under the policy

Everything in the world, except a few things that are in there, doesn't come under the policy. That doesn't help me.

The Court:

I suggest you proceed and give us whatever proof you have in connection with the sinking of this boat.

Mr. Dow:

You see, I only learn what the defendant does not contend by the objections they make to the questions I ask my witness.

The Court:

It is not so important what they contend as it is what you can prove right at this stage.

Mr. Dow:

I will make the statement definite, so we will avoid the obvious objection, that the plaintiff has claimed in addition to the loss of the thirty thousand dollars some additional losses as a result of the defendant not paying the claim when it should have. I must go into the details.

Mr. Batchelor:

I am not going to object to going into that. The complaint demands damages of thirty thousand dollars with interest and costs and nothing else.

Mr. Dow:

It demands attorney fees as provided by Florida law. I think we amended the complaint Wasn't that complaint amended?

Mr. Willner:

At this time I move to amend the complaint instanter, Paragraph 8, substituting the names of Arthur L. Willner and Wilbur E. Dow for that of Flowler, White, Gillen, Yancey and Humkey.

Mr. Batchelor:

No objection.

Mr. Dow:

Was there a subsequent amended complaint for loss of profits?

Mr. Willner:

No, sir.

(By Mr. Dow):

Q. Were you compelled to employ counsel in an attempt to collect this claim?

A. Yes, sir.

Q You employed our office; is that correct?

A. That is correct.

Q. When the vessel was in Caicos fishing after you purchased it, how long did you operate that business before she was lost, approximately?

A. I would say approximately ten months.

Q. Will you tell us what that vessel did and its importance or otherwise with relation to the business as it was done before the ship arrived or you have operated since?

Mr. Batchelor:

We object.

Mr. Dow:

So the Court will get an idea of the type of vessel it was.

Mr. Batchelor:

We object to any testimony about the operations of the business down there.

The Court:

Well, if counsel means the activity of the ship in the water, what kind of work it was doing, that might be relevant.

Mr. Batchelor:

I understood his question to go much further, than that, to talk about its importance to the business.

The Court:

The question today is how this boat was used, what it was used for, and how it was managed and where it went in connection with its work.

(By Mr. Dow):

Q. You tell the Court that. Address your reply right to the Court, not to me.

A. The boat operated out of a little harbor down in South Caicos. It went on voyages of approximately sixty to seventy miles on the average. It stayed out anywhere from one week to three weeks, collecting fish with a fleet of fishermen. These fish would be put into the boat, be washed, cleaned, frozen, quick-frozen, and then packed and stored, until the boat accumulated a load of fish, in which case it would return to port and put the fish in a holding box, to be sent by air to Miami.

Q. Did you replace this ship?

Mr. Batchelor:
I object.

The Court:
What do you mean, replace it?

(By Mr. Dow):
Q. Did you buy another one like her or build another one like her?

The Court:
That would not make any difference. If he lost this one under the terms of the policy he would get thirty thousand dollars, whether he bought another one or not.

Mr. Dow:
Very well, sir.

Q. At any time, or from time to time did you receive any reports from the captain of the vessel as to the manner in which she operated or any circumstances surrounding her operation?
A. Yes. I was always quite interested in the boat, as you can imagine, and always asked the captain, Mr. Berlinski, the condition of the boat when she went out and when she went in, and all particulars concerning her, because I realized she was such an important asset to our business down there.
Q. What was the nature of the replies or reports you received from the captain?

Mr. Batchelor:
I object. That is hearsay testimony.

The Court:
It certainly is. Where is the captain? He is the one who can tell us about that.

Mr. Dow:
He is here.

The Court:
Is he going to testify?

Mr. Dow:
Yes, sir.

The Court:
All right.

(By Mr. Dow):
Q. Did you at any time ever receive any requests for parts or equipment from the captain?
A. Certainly. I always received requests.
Q. Raise your voice. The Court can't hear you.
A. We always received requests for caulking, paint; and parts.
Q. Did you always fulfil those requests?
A. Yes. We had to. It was our business to keep that boat in good condition.
Q. Did at any time the captain ask you for anything that he considered necessary where you disagreed with him and wouldn't send it to him?
A. No. We had the utmost faith in Mr. Berlinski and anything he asked for he always received.
Q. After the loss of that ship did you make a report to the underwriters' agents here?
A. That is correct.
Q. Did you receive your insurance money?

A. No, we didn't.

Q. Did you offer to make a full disclosure and make your personnel available to the defendants or their representatives after the loss?

A. Yes. At all times we wanted to cooperate as much with the insurance company as we could, because we realized that a quick settlement of this claim would have helped us get started to build another boat and send it down there. As a matter of fact, I can remember where we even offered to fly the insurance company in this case down to South Caicos at our own expense to make sure the matter was settled to their satisfaction, but, of course, they subsequently refued.

Q. There is no regular air service there?

A. No, there is not.

Q. At that time you had your own plane that was flying the fish out?

A. Well, no. The plane didn't fly fish out. It was used mostly for personnel and executive transportation. We had our own air service to the island, which was the most convenient way to get there.

Q. At any time, Mr. Willner, did you ever receive from Captain Berlinski or Captain Moran or anybody else down in South Caicos any reports concerning the condition of the Sea Pak that would indicate she was unsatisfactory?

A. No, never.

Mr. Dow:

Your witness.

Cross Examination.

(By Mr. Batchelor):

Q. When you bought this vessel or business, whatever it was, and you took over down there, as I understand it, the vessel was already down in South Caicos; is that right?

A. That is correct.

Q. So, the ten months you are referring to that you operated it, at the time you operated the vessel and when you bought it, she was already down in South Caicos and was operating?

A. You are correct.

Mr. Batchelor:

That is all.

(Witness excused.)

LEONARD O. BERLINSKI, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):

Q. Will you state your full name and address to the Court?

A. Leonard O. Berlinski, 456 Northwest 4th Street.

Q. How old are you?

A. Forty-eight years old.

Q. What is your business?

A. I do repair business for Benjamin & Jay Corporation.

Q. What business are they in?

A. They handle service materials, generators, Deisel engines and other equipment.

Q. Heavy machinery?

A. That is right.

Q. Are you also a captain?

A. Not at the present time.

Q. Not at the present time. Are you also able to command a ship?

A. Yes, sir.

Q. Will you tell the Court just how many years you have been associated with vessels? Not me; the Court. I only ask the questions.

A. Well, ever since I was eighteen years old.

Q. At one time did you work for Mr. Barba in the reconstruction of a vessel which subsequently became the Sea Pak?

A. That is right.

Q. Were you in charge of that reconstruction?

A. Yes.

Q. Was that reconstruction done under the supervision of a surveyor?

A. Yes, sir.

Q. Who was the surveyor and who sent him there?

A. Mr. Stuart. I don't know the company's name offhand, but it was Mr. James Stuart was the surveyor.

Q. Was he working for the vessel owner or the underwriter, if you know?

A. He was working for the underwriter.

Q. How often did you see Mr. Stuart during the reconstruction of that vessel?

A. Well, at first he used to come around there probably several times a week. After that we would call him on anything we were not sure about. We

would call him and he would come down and advise us what to do.

Q. How long have you known Mr. Stuart?

A. I wouldn't say how many years offhand, but it has been a long time.

Q. Do you have confidence in him?

A. Yes, sir, I certainly do.

Mr. Dow:

Your Honor, and Mr. Batchelor, to cut this short, I am going to eliminate any question as to the manner in which the vessel was reconstructed. There is a great deal of detail to it. I think we can save all of that, because by what has already gone before I don't think it is any longer material, if it ever was.

Q. Was a certificate subsequently issued by Mr. Stuart?

A. Yes. As far as I know, yes.

Q. Was it likewise inspected by the Coast Guard?

A. Yes, sir.

Q. Did they find everything in order, or did they find things not in order?

A. They found everything in order.

Q. Were you required to have a Coast Guard certificate?

A. We were required to have a boat inspection. I don't recall—We were not required to have steamboat inspection.

Q. Did you discuss the vessel with Mr. Stuart after the work was completed?

A. Yes, sir.

Q. What did he say to you?

A. He said the boat was all right, as far as—He said it was in seaworthy condition.

Q. Did you have any discussion with the Coast Guard after they completed their work?

A. No discussion, except that they made an inspection of the boat.

Q. You took her down to Caicos?

A. That is right.

Q. And there you operated her in the fishing business?

A. That is right.

Q. From the time you first went down there, how long were you there before you left?

A. Just about a year.

Q. Now, will you tell the Court, please, and not me, because I think I know, but the Court doesn't, how that vessel performed, what you did to her, if anything, from time to time and the manner in which she fulfilled the purposes that I suppose were expected of her at the time she went down there?

A. Well, as far as the vessel is concerned, it worked out exactly as we had expected. It certainly was good for the business, and we would make regular trips with it. As far as having trouble, it certainly was giving us all we expected from her.

Q. Did you have at any time any leakage in the hull, or damage to the hull?

A. As long as I was aboard only the normal leakage you would have in that type of vessel.

Q. Explain to the Court where that comes from?

A. Well, it comes through the stuffing boxes and so on and so forth. You will have a little seepage here and there, because it was a plank vessel, which was perfectly normal.

Q. Was there ever a wooden ship built that you ever heard of, Mr. Berlinski, that didn't have a certain amount of seepage in her bottom?

A. Never, not that I know of.

Q. Did you ever have any trouble with her pumps?

A. No, sir, not while I was aboard her.

Q. Did you have any trouble with the main engines?

A. On several occasions, yes, we had trouble with the engines, which you do on all vessels.

Q. And they were repaired?

A. That is right.

Q. And the ship was in good shape when you left her?

A. That is right.

Q. How many days were you gone before she was lost?

A. If I recall, approximately two weeks. I won't say definitely. That is approximately.

Q. Now, how long did you work with Captain Moran?

A. Well, I had known Captain Moran before I sailed for South Caicos with the vessel.

Q. How long had you known Captain Moran?

A. I hadn't known him before.

Q. That is the first time?

A. That is right.

Q. So, you had known him for about a year?

A. That is right.

Q. He was with the previous owner the same as you were?

A. No, sir. For a short time he was, yes.

Q. So, when the present owner bought the vessel or the company you stayed with the company and Captain Moran stayed with the company?

A. That is right.

Q. You turned this ship over to Captain Moran before you left?

A. Yes, sir.

Q. Will you tell the Court your opinion of Captain Moran as a successor?

A. As far as I know, he is successful in handling a boat of that size. I thought he did quite well. I have no reason to believe he couldn't.

Q. Had he handled it before for you while you were—Did he ever handle the ship before for you?

A. Yes, he did. He took over for me one time when I had an infection in my arm. I had to come in. He brought the boat in for me.

Q. How long did he replace you that time?

A. I think about three days.

Q. From time to time did you have reason to call upon the vessel's owners, the assured here in this case, for parts, supplies, equipment or tools of any kind for the maintenance, upkeep and repair of the Sea Pak?

A. Yes, certainly.

Q. Tell the Court the nature of what you would ask?

A. Well, I couldn't remember.

Q. Roughly, generally.

A. I couldn't give you any detail. There were paints, engine spares, and so forth; the normal repair parts that would be required in the operation of the vessel.

Q. Did you receive them promptly?

A. Yes, sir.

Q. Did you ever ask for anything you didn't get?

A. No, sir.

Q. Did you ever have any difficulty with the hull of the ship and, if so, tell the Court what it was, when, where and what?

A. As long as I was on the boat I never had any difficulty. We always made periodic inspections of the hull as to her cleanliness on the bottom, which we could do by going under the boat and checking it.

Q. When and where did you go under the boat, what sort of people did it, and what would you do when you got there?

A. I was under the boat myself on several occasions. We scraped the bottom with a brush to keep it clean, as you would on any other wood vessel.

Q. You mean to remove seaweed and moss?

A. There would be stuff like that, yes, sir.

Q. What difference does it make if that grows there or not?

A. It reduces the speed of your boat, which is not —which was not the real problem down there; however, it keeps the boat clean.

Q. When you keep a hull clean what has that got to do with the length of life of the hull itself, if anything?

A. Well, I don't know as it would affect the length of life, because—I don't really think it would make any difference in that respect, but certainly in operation it should be done to keep up the boat.

Q. Why do you want to keep her up? That is what I am trying to get at. What was the point of it?

A. To keep her clean.

Q. Cleanliness is virtue in itself; is that the idea?

A. I would say so, to our ship, yes.

Q. Did you employ divers down there?

A. Yes. We had divers down there on several occasions.

Q. What did the divers do?

A. Well, they would primarily come down there to catch crawfish.

Q. They worked for the company by diving under and getting crawfish; is that it?

A. That is right.

Q. They are American boys here from the mainland, or are they natives, colored natives from Caicos?

A. No. They were American boys.

Q. They bring their own equipment with them, do they not?

A. Yes, sir.

Q. Just what did you ask them to do, or what did they do at any time, if you can remember?

A. At one time they went under the boat to make an inspection, because they had masks, so they could make a thorough inspection.

Q. By a mask you mean something over the face?

A. That is right.

Q. And air comes into it?

A. That is right, so they could stay under there as long as they wanted to to make that inspection.

Q. Approximately when was such a thing done?

A. Oh, that was—I don't remember the exact time, but it was probably two weeks before I come back, the last inspection.

Q. It would be sometime in July, then, is that it?

A. I would say so.

Q. And the vessel was lost, was it not, on Friday, the 13th of August; is that correct?

A. That I couldn't tell you, the date; I don't know the exact date.

Q. Did the divers make any report to you after they were under there?

A. Yes. They said it looked all right.

Q. In your opinion, were they competent to judge that?

A. Well, I guess anyone is competent to judge that as long as they have eyes to see. I really don't know their qualifications as to vessels or anything, because I hadn't known the boys long enough for that, but would say yes.

Q. In other words, if there was a hole there you could see it; is that it?

A. You could see it, yes.

Q. If there was a plank split—

A. Or a loose plank, yes, they certainly should be able to see it.

Q. Did the divers say that they found any holes?

A. I don't recall what the conversation was after they come up. They found some holes, and they were plugged, and I believe we talked about that at the time. I tried to explain to them that there were some seacocks which come through the bottom and should not be mistaken for anything.

Q. Will you explain to the Court what you mean by a seacock coming through the bottom, what it was used for and what the purpose of it was?

A. A seacock is used both for engine cooling and also for refrigeration. There is a hole through the bottom of the boat, which is lined with a brass fitting and fastened to the seacock on the inside of the hole; on the outside it looks like a plain hole through the bottom of the boat. There are water intakes and discharges, both for refrigeration and engine.

Q. How many were there in the bottom of that ship?

A. Well I would have to—

Q. Approximately, if you know.

A. There are four for the engines and two for the refrigeration, and there were several other holes for the toilets, and so on and so forth.

Q. Will you explain the difference to the Court between holes such as you have just described in both appearance and size and a hole, for example, which might have been caused by hitting a rock?

Mr. Dow:

Maybe I insult the Court's intelligence by asking so obvious a question, but you may wish Mr. Berlinski to answer it.

Q. Go ahead.

A. If there was a hole in a hull that was put there by a drill, or something like that, it would certainly be smooth. If it were pushed through by hitting a submerged object or running aground, or something like that, it would be ragged; it would be splintered and the planking would be tore up. It certainly would not be a round hole.

Q. Were there any of those intakes or discharges in the bottom of the ship—All vessels have something like that, do they not?

A. Yes, sir.

Q. Many or less, depending on the machinery?

A. That is right.

Q. Were there any there that were not directly connected to any of the main engines or refrigerating machinery?

A. Yes. There may have been several. I believe there is two in the engineroom that were not in use at the time.

Q. How did they happen to be there and why were they there and why weren't they in use?

A. They were left there to install additional equipmest or large intakes, or something like that, but they were sealed and capped on the inside, as well as a seacock, I think, on the inside.

Q. They were there at the time the vessel was reconstructed?

A. Yes, sir.

Q. To Mr. Stuart's knowledge?

A. Yes, sir.

Q. To Mr. Stuart's knowledge?

A. Yes, sir.

Q. Mr. Stuart approved of leaving them in there for that purpose?

A. Yes, sir.

Q. Was there anything that Mr. Stuart ever wanted you didn't do?

A. Not that I know of. In fact, if I wasn't sure I would call on him to help me out on that.

Q. How big were those holes, perhaps from the discharges? How big are things like that?

A. Some are ose inch; some are two inches. I believe two inches is about the largest we had.

Q. What would the two inch ones be for?

A. That would be a discharge from your lavatories and the basin drains, and stuff like that.

Q. If you plugged those up what would happen?

A. Nothing would happen; you just couldn't use the facility aboard the boat.

Q. If you plugged up some of those unused overboard discharges from the bottom as well as the top, what would happen?

A. Nothing would happen.

Q. You have been about thirty years around ships?

A. At least that, I would say.

Q. When you left the Sea Pak in South Caicos to come home, I understood you to say for the first time in a year. will you tell the Court your opinion of the condition of that vessel as and when you turned her over to Captain Moran?

A. Well, the only thing that I recall, Mr. Stuart and I went out one Saturday afternoon and as we were driving along Biscayne Boulevard—

Q. No. Excuse me. I don't think you understood the question. Go ahead with the answer. Maybe you did understand it. So, you were driving along with Mr. Stuart. That is this surveyor that was here?

A. No, no. I am talking about Mr. Willner Stuart.

Q. Stuart Willner?

A. My mistake. Perhaps I did say Mr. Stuart. We were discussing whether or not I was going back to work over in Caicos.

Q. That was after you had been here about two weeks?

A. That is right. We were also discussing the bill of sale of the vessel for the fellow to sign. He asked me at the time whether we should haul the boat immediately. I said, "Yes, sir, it probably should be, but we can work another season with it without doing too much to it." That is for painting, and so on and so forth.

Q. You considered her in seaworthy condition at the time?

A. Yes.

Q. Seaworthy enough to withstand another season of work?

A. Another season if necessary, because the boat was important in the operation.

Mr. Dow:

That is all. Your witness.

The Court:

We will recess until 1:30.

(A recess was then taken until 1:30 p.m. of this date.)

Afternoon Session.

Miami, Florida,
September 27, 1955,
1:30 o'clock p.m.

The Court:
Proceed.

LEONARD O. BALINSKE, a witness called on behalf of the Plaintiff, thereupon resumed the witness stand and further testified as follows:

Cross Examination.

(By Mr. Batchelor):

Q. Captain, I believe you have testified that the divers found a hole somewhere in the bottom of the ship; is that correct?

A. Why, yes. They mentioned finding holes, yes, sir.

Q. I believe you mentioned some kind of a plug was inserted; is that correct?

A. That is right.

Q. After this episode with the divers did all of your equipment on the boat which used these fittings that went through the hole operate properly?

A. Yes, sir.

Q. If plugs had been put in any of those particular fittings they would not have operated properly, would they?

A. That is right.

Q. Now, you have mentioned, Captain, when the boat was worked on here in Miami the year before there were some of these pipe fittings that went through the holes that were not removed from the boat?

A. That is right.

Q. And they were not in use on the boat, but were what I believe you call blanked off on the inside, so they are still in the hole if you want to use them again?

A. That is right.

Q. Where were those fittings that were blanked off in that manner?

A. There were two in the engineroom which were never used.

Q. One on either side?

A. No. I believe they were both on the port side of the boat.

Q. How high up on the hull were they?

A. They were below the waterline.

Q. Approximately how far?

A. Oh, probably twelve inches below, if I remember correctly.

Q. Were there any other such fittings in the vessel which were left and not used?

A. Not that I recall, no, sir.

Q. As a matter of fact, there were no more; isn't that correct?

A. I couldn't answer that accurately that way, no, sir.

Q. Do you remember testifying on a deposition, Captain, at Mr. Willner's office on May 14th of this year?

A. Yes, sir.

Q. Do you remember my asking you this question after you had testified about the two hole fittings which were left in the engineroom: "Question: Were there any others through the hull sheeting left in the ship not in use?" You answered: "No, sir." Do you recall that?

A. I don't recall that.

Q. Where was this hole that the divers put the plug in?

A. I don't know where that hole was. They didn't tell me where it was. I was busy doing other things. I don't know where it was.

Q. Do you mean to tell me that as master of that ship you knew that they had to put a plug somewhere down in the bottom of the ship and you didn't even find out where it had been put?

A. Because I wasn't concerned. Everything was in working order. If they put it in one of the fittings that weren't used, which are always two or three inches deep, that wouldn't make any difference.

Q. Captain, do you remember talking with me in the presence of a Court reporter in my office in October of last year?

A. Yes.

Q. On October 19th?

A. I don't remember the date. I remember being there.

Q. Do you remember my asking you this question: "Did you ever know where they put that plug in down there? Answer: No. I don't know. It was just forward of the engineroom bulkhead." Do you recall that?

A. I recall answering the question somehow. That is approximately where they were under the boat.

Q. Just forward of the engineroom bulkhead?

A. Approximately, yes.

Q. I believe you testified here today with respect to those divers you guessed they were competent divers?

A. That is right.

Q. Is that your opinion about those divers?

A. I don't know anything about diving—

Q. What was your opinion on this—

A. —whether they were competent or not.

Q. You don't know whether they were incompetent or not, or were competent or not. What was your opinion of them?

A. What do you mean, what was my opinion?

Q. From your observation of them out there, as a marine man when you saw them out there, what was your opinion as to their competency and their capabilities to go under and look at the boat?

A. I testified that they should be able to. Anyone should be able to see a hole in a boat, but there is a difference between holes. There is all sorts of holes you can make. You can drill a hole and you can have a hole that is pushed through the hull. They certainly would look different.

Q. Were you willing to rely on their judgment in inspecting the bottom of that ship?

A. Yes, I would say so.

Q. At the instance when you were in my office, Captain, in October of last year, do you remember saying this: "Those two divers they had down there, as far as I am concerned, are very responsible, but as far as boats, they know nothing"?

A. That is when they were through. I didn't like their actions in some instances, but as far as boats, I still say they may not know anything.

Q. You further said: "I wouldn't pay any attention to them, anyway, because they are a couple of irresponsible fellows, and I certainly could not go by what they say". Do you remember making that statement?

A. That is correct.

Q. As a matter of fact, those divers were primarily out there swimming around; isn't that true?

A. That is right.

Q. They didn't come out there for the purpose of inspecting the snip?

A. I later learned that they had come out there to look at it.

Q. You didn't request them to come out there, did you?

A. No, sir. I didn't.

Q. How much time did they spend looking at the ship, Captain?

A. Well, that I don't know. They were out there for some time. I couldn't tell you the exact time.

Q. What is your best estimate? You were on board that day, were you not?

A. Yes, I was, but I had a lot of other duties to do without paying attention to divers, swimmers or people around the boat.

Q. What is your best estimate as to the amount of time they spent looking at the boat?

A. I couldn't tell you, because I don't know when they come out there.

Q. Does this refresh your recollection: I am again reading from the statement given in my office, the question and answer statement given on October 19th, 1954. "Question: You remember how long they were out there or what they did? Answer: They were only out there thirty minutes, that is all."

A. That is possibly right.

Q. When was it that these divers examined the bottom of this boat? Can you tell us approximately the date?

A. No, sir. I don't remember the date. It was sometime before I left there to come home on my vacation.

Q. Let's go back a little further. How long had the vessel been in port before you left to come back to Miami?

A. I wouldn't venture to answer that, not at this time. I don't remember whether it was two days or three days or four days.

Q. Is it your recollection it was approximately two to four days after you got back in port you came back to Miami?

A. It could be, yes.

Q. How long had you been out on this last trip?

A. I think it was three weeks; something like that.

Q. Did the divers inspect the boat before or after you took your last trip, which lasted three weeks?

A. I believe it was before I took my last trip.

Q. Do you remember approximately how long before you took your last trip they went down and examined it?

A. No, sir, I don't remember.

Q. Does this refresh your recollection: I am referring again to the statement given in my office on October 19th. "Question: Do you remember approximately how long it had been when they had gone down? Answer: I would say approximately four or five weeks before I went out on my last trip." Does that refresh your recollection?

A. That could be.

Q. Did any of the crew go over with the divers when they went overboard to look at the bottom?

A. Some of the crew always went over with the divers when they were swimming around the boat, yes.

Q. Do you remember particularly whether any went over on this trip, this time we are talking about?

A. Yes. I believe several of the boys went in with them.

Q. Who went over with them? Do you know the names?

A. I don't recall their names, no, sir.

Q. Let me ask you if this refreshes your recollection, again referring to the statement of October 19th: "Question: Was any of the crew in the water at the time these divers went down there? Answer: Yes. Question: Do you remember who they were? Answer: Yes. I know Roy Jennings was in the water with them. I distinctly remember that, because the divers put the face mask on him. He went down and come up very rapidly, because he was not used to breathing compressed air." Does that refresh your recollection that Jennings was with them?

A. Yes, it does.

Q. Was the ship ever hauled and the bottom painted after she left Miami in August of 1953?

A. No, sir.

Q. Pardon me?

A. No, it wasn't.

Q. You have mentioned that on several occasions you went overboard, perhaps you and some other members of the crew, and scraped the bottom and inspected it when she was lying afloat?

A. Yes, that is right.

Q. Can you tell us approximately how long it was before she sank that you last went over and scraped the bottom and inspected the ship carefully?

A. I would say it was on my last trip out.

Q. How long would that be before she sank?

A. Why, that might have been three weeks before she sank.

Q. It is your testimony within approximately three weeks before she sank you went underneath, scraped the bottom and gave it a careful inspection?

A. That is right.

Q. Who was with you on that occasion?

A. My crew.

Q. Can you give us their names?

A. There was Henry Mills, and I don't remember the other boys that were with me on that trip.

Q. Do you remember making an affidavit on August 16th, of 1954, in this matter, at the request of Milton L. Jones?

A. Yes.

Q. Do you remember stating in that affidavit: "The underwater body was cleaned and inspected, the last cleaning of which was made about six months ago, by myself"?

A. Six months ago, and at intervals between that time.

Q. Well, now, after the six months period what did you do? What kind of inspections did you make?

A. The same kind of inspections.

Q. Isn't it a fact that after that cleaning which you mentioned here as having taken place six months before all you did was to make a cursory inspection at times when you went down and checked on the strainers on the refrigerators, motors and engines?

A. That is the same type of inspection. It doesn't make any difference when you make it. We used to do that on every trip out.

Q. As I understand it, the last time you went down and scraped off the bottom and gave it a careful inspection was six months past?

A. It was three weeks before.

Q. I will ask you if this is your signature?

A. That is right.

Q. Are these your initials on the first page?

A. That is correct.

Q. Do you recognize that signature?

A. Yes.

Q. This is your signature on that?

A. Yes. As I told you before, I don't recall every incident that happens on a boat, because of other things on your mind in running a vessel of that kind.

Q. Did you make this statement on August 16, 1954?

A. Yes, sir.

Mr. Batchelor:

I would like to offer this for identification.

Mr. Dow:

Let the record show I never knew it was taken. This is the first time I have ever seen it. For identification purposes, of course, I could have no objection.

The affidavit of Leonard Olaf Berlinski, taken on August 16, 1954, was thereupon marked "Defendant's Exhibit No. 1 for Identification."

Mr. Dow:

Did the witness receive a copy of this?

Mr. Batchelor:
I don't know. I didn't take it.

Mr. Dow:
You took it. Did you give him one?

Mr. Batchelor:
You are incorrect, Mr. Dow. I didn't take it.

Mr. Dow:
It is objectionable. I am not interested in it.

(By Mr. Batchelor):

Q. Subsequent to this vessel's departure from Miami in August, of 1953, up to the time you left her in the latter part of July, about three weeks before she was sunk, had she been aground that you know of?

A. Not while I was on board, no, sir.

Q. I believe you said you had been aboard all except, perhaps, three days of that time when she was underway?

A. Yes, sir.

Q. Had she ever had any accidents?

A. No, sir.

Q. Had you ever encountered any heavy or unusual weather?

A. No, sir.

Mr. Batchelor:
That is all.

Mr. Dow:
That is all.

The Court:
There is a question I want to ask this witness before he goes.

Questions by the Court:

Q. You say there was a plug in one of those pipes that came down through the boat?

A. Did I say there was a plug?

Q. Yes.

A. I merely stated if they put a plug—Well, what I am trying to say is they could have put a plug in one of those pipes and it would not have interfered with the operation.

Q. I understand that. Did they tell you they did put one in there?

A. Yes, sir, they did.

Q. Do you have any idea why they did?

A. No, sir, I don't.

Q. Did you ask them why they did?

A. They said there was a hole in the bottom of the boat, that is all.

Q. There were several holes there, weren't there?

A. Yes, that is right.

Q. Do you have any idea why they picked out this particular one to plug?

A. I sure don't, no, sir.

Q. You didn't ask them why they did?

A. No, sir.

Q. If the plug had been removed it still would not have leaked?

A. It wouldn't have made a bit of difference, because the seacocks not being used were capped off on the inside.

The Court:

All right.

Mr. Batchelor:

May I clarify one more question along that line?

The Court:
Sure.

(By Mr. Batchelor):
Q. Did these men tell you they put a plug in a pipe or a hole?
A. They didn't say which it was. They said a hole.
Q. They didn't tell you whether it was a pipe or a hole?
A. Just a hole.

Mr. Batchelor:
That is all.

(By Mr. Dow):
Q. Did they report any damage to the ship?
A. No, sir.

The Court:
Where are these divers at this time? Do either of the parties know?

Mr. Dow:
Waiting on the outside.

The Court:
All right. You are excused.

(Witness excused.)

JOHN MONKOFF, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):

Q. Will you give the Clerk your full name and address?

A. John L. Monkoff, 1357 Westward Drive, Miami Springs.

Q. What was that address again?

A. 1357 Westward Drive, Miami Springs.

Q. What is your business?

A. I am a professional diver.

Q. How long have you been engaged in that business?

A. About eleven years.

Q. In that time have you been doing anything else?

A. Yes, sir.

Q. What is that?

A. I was in the sporting goods business, and I went to school and things like that.

Q. In the past eleven years how much of that time has been devoted to the business of diving?

A. Practically each year I would dive part of the year; I mean for some time of the year.

Q. What proportion of those eleven years has been spent diving?

A. Just a lot of it.

Q. Half, more than half, or less than half?

A. I would say half.

Q. Where did you receive your training?

A. I was trained to dive in the Navy.

Q. You talk to the Court, not me. How long did that training last in the Navy?

A. Two months.

Q. Did you dive for the Navy after that?

A. Yes.

Q. Who have you dove for since?

A. I have my own salvage business. I dove for Logan Brothers, for Byrd Brothers, for the Diver Corporation, for different construction Companies, and things like that. I dove for the—

Q. Talk to the Court.

A. —for the State, the State of Florida; for several cities.

Q. How deep do you go?

A. I go down three hundred feet.

Q. Is that the maximum working depth for a professional diver?

A. I wouldn't say you can even do much work at three hundred feet. I have just been down three hundred feet.

Q. How deep does the Navy certify a diver?

A. 150 feet, I think. I guess they have done deeper diving, but they don't go farther.

Q. If you go down three hundred feet you can't do much?

A. Not much. You can't say down there.

Q. How much time can you spend on a wreck at three hundred feet in one day?

Mr. Batchelor:

It seems to me that is immaterial.

Mr. Dow:

I will bring out the materiality.

The Witness:

I don't know; not much. Maybe five minutes or ten minutes.

Q. Three hundred feet is fifty fathoms; is that right?

A. I guess so.

Q. Speak up and speak to the Court, now for the last time. So, anything that is more than fifty fathoms or three hundred feet down below, divers can't go down and work on it; is that right or wrong?

A. Well, they can with the proper equipment, with diving bells and such elaborate equipment, that I have never been in contact with or used. I guess they have worked wrecks in five or six hundred feet with the proper equipment, but the regular self-contained or suit diving, no, they don't work much over, I would say, two hundred feet. They try to stay away from anything over that.

Q. Is there any of that equipment around here?

A. There is diving bells in Florida you can rent and hire.

Q. So, if anything goes over the hundred fathom curve or more than six hundred feet, would you consider it a practical matter to get down to it?

A. I wouldn't go over three hundred feet.

Q. Were you once employed by the plaintiff, Tropical Marine Products?

A. Yes, sir.

Q. What did you do?

A. I was employed by that company to look into the possibility of training natives on the island where that company's for diving for lobsters, shallow water diving for lobsters.

Q. You trained them with equipment of sime sort?

A. We were going to show them how to use regular shallow water equipment, so they could catch lobsters by diving.

Q. Were you successful?

A. Yes.

Q. Did you have another diver with you at the time?

A. There were two of us down there, yes.

Q. What was the other diver's name?

A. Bill Dammon.

Q. How do you spell the last name?

A. D-a-m m-o-n, or a n.

Q. Where is he now, do you know?

A. I believe he is down by Caicos now.

Q. Still diving for the same company?

A. Yes, sir.

Q. Can you tell us how long you were diving in Caicos for the plaintiff, from what period to what period, approximately?

A. The first time I was there three weeks; the second time I was down there about two months.

Q. When were those periods of time?

A. They were last year; both of them were last year, last summer and last fall.

Q. You were down there diving before the Sea Pak was lost and you were down there diving after the Sea Pak was lost?

A. Yes, sir.

Q. While you were down there while the Sea Pak was in operation were you ever called down to examine her bottom?

A. Yes, sir.

Q. Will you tell the Court, please, what experience you have had, if any, in the examination of vessels from some point underneath the waterline while they were afloat? Tell the Court, not me.

A. Well, I have worked for different boatyards checking hulls, changing props, and such as that under water. I have been around boats all my life. My father was in the boating business.

Q. Keep your voice up.

A. My father was in the boating business. I have been a boat enthusiast. I have been around boats a good part of my life.

Q. In your own opinion, do you believe you were competent to make an intelligent report on the condition of the hull?

Mr. Batchelor:

I object. That is a matter for the Court to determine.

The Court:

Yes, I think so, but I think he has already given us enough information as to be considered. Proceed. I want you, counsel, to fix the time he made the examination of this particular boat.

Mr. Dow:

That is correct.

The Witness:

Just before we were returning on our first trip down we made, back to the States, I was asked if we couldn't make—go down and take a look at the bottom of the boat, just to see if it needed to be cleaned off. We went down; both of us dove on it. We spend about an hour on it, checking the bottom. We checked it, looked it over, and checked it for dry rot, just gave it a general check.

(By Mr. Dow):

Q. Did you use any tools?

A. I carried a screwdriver with me—I don't know what the other fellow carried along—just to probe with, any places that might look like they might have a dry rot or anything, that is all. We just dove down to see if the bottom needed cleaning.

Q. What did you find?

A. Well, we just told them that it was all right, it just needed some scrub brushes to scrape the growths off.

Q. In your opinion, was it a seaworthy hull, based upon your own past experience?

A. Most definitely.

Q. Can you tell the Court the difference in appearance, or would you be able to tell the difference in appearance between an opening in the bottom of a vessel caused by a blow from a rock, for example, and an opening in a vessel caused by an overboard intake or discharge?

A. Anybody could.

Q. Tell the Court. The Court has never been under a ship.

A. Yes, I can tell.

Q. Describe the difference between them. It may sound silly to you, Mr. Monkoff, but we want to know these things.

A. We checked the hull from the waterline down to the keel, from the stem to the stern, the entire bottom of the boat. There were scrape marks on the boat, where it had scraped—I don't know what, but there was nothing on the butts and there were no planks that were caved in or stove in; the general condition of the hull was good and sound, as far as I could see. The other diver felt the same way. I

didn't notice anything on the bottom that looked like it had been caved in or stove in any place.

Q. There is an entirely different appearance to a discharge vent and a damage; is that correct?

A. Yes, sir.

Q. Can you recall putting any plugs or wooden fittings in any opening of any kind in the bottom of the boat at that time?

A. No, sir, I can't.

Q. Supposing—If you don't feel you are competent to answer this, please say so, but supposing there were a hole in the bottom of the vessel, whether it was bored there with a pipe through it, or no matter how it got there, an inch in diameter, so you could put your finger through it, or something of that kind. how long would it take, if you think you know, to sink that ship?

A. I wouldn't know.

Q. I mean, an hour or a month?

A. It wouldn't take log, I wouldn't think.

Q. Do you mean by that a few hours or a few days, or what are you talking about?

A. I would say maybe half a day, a boat as big as that boat was.

Mr. Dow:

Your witness.

Cross Examination.

(By Mr. Batchelor):

Q. How long did you say you were under that boat?

A. About an hour. I was under it half an hour in a diving mask, and the other fellow was in about

the same time. It was a year ago; I don't know. I just say about an hour.

Q. You were under a half hour?

A. Yes, sir, half the time; half an hour apiece.

Q. You yourself were underneath the boat for one-half hour?

A. Yes, sir.

Q. Who was captain when you inspected this vessel?

A. I guess Mr. Berlinske or Balinske, or something.

Q. Who asked you to inspect the vessel?

A. I was asked by a gentleman by the name of Mr. Rothstein.

Q. Did you see Mr. Berlinski when you went out to the boat?

A. Yes, sir. He helped us get our gear out there, and was there at all times.

Q. You talked with him while you were out there?

A. I don't remember that I talked to him.

Q. But he was there and you were there?

A. Yes, sir.

Q. Where did you stay the half hour that your partner was down in the water?

A. I was in the water at the same time.

Q. But you were not underneath the boat?

A. I was, but I was only in fins and mask. I wasn't in any diving apparatus. I was just checking the waterline.

Q. You were not underneath the hull, checking that part of it?

A. No, sir.

Q. You said something about finding some scrape marks on the bottom of the ship. Do you recall that?

A. Yes, sir.

Q. Where were those marks and what did they look like?

A. They looked like—maybe like a scuff mark would look on a waxed floor.

Q. Where were they?

A. I don't recall where they were. I just remember that there were some there.

Q. Do you remember talking with me in the presence of a Court reporter on October 18th, 1954, on board the Skipper up here in the Miami River?

A. I remember talking with somebody; I don't remember who.

Q. On board the Skipper up in the Miami River?

A. Yes, sir.

Q. Do you remember these questions being asked you and these answers being given by you at that time: "Question: Did you notice whether there were any scrape marks or anything on the bottom which might indicate she had been aground or hit anything? Answer: No. No more than you would find on any boat. In other words, if you run a boat aground and hit it hard there is going to be a scrape mark. Question: You didn't see anything like that? Answer: No." Does that refresh your recollection?

A. Could you read the first part of that back again?

Q. I will read it all. "Question: Did you notice whether there were any scrape marks or anything on the bottom which might indicate she had been aground or hit anything? Answer: No. No more than you would find on any boat."

A. That is just what those marks that were on the boat were, no more than you would find on any boat.

Q. You didn't see any marks that would indicate she had been aground or hit anything?

A. Definitely not.

Q. What was the condition of the paint on the bottom of this boat?

A. Well, the bottom had grass on the bottom of the boat. It was just—As far as the paint, I don't remember what the condition of the paint was.

Q. Let me see if this refreshes your recollection. I am reading the questions and answers taken at the same time, on October 18th, last year, on board the Skipper. "Question:—" I started the question thusly: "And there was no indication from the paint that would—" Before the question was finished this answer was given: "There was no paint on it, no paint that you would call paint." Do you recall that?

A. Yes, sir. That was closer to the time that I looked at the hull than it is now. This is a year later.

Q. It is now your recollection when you looked at the bottom of the boat there was no paint on it you could call paint?

A. That is just what I said.

Mr. Batchelor:

That is all.

Re-Direct Examination.

(By Mr. Dow):

Q. Do you know, Mr. Monkoff, whether or not the other diver might have inserted any plugs on his side?

A. Not to my knowledge.

Q. One worked one side and one worked the other?

A. No. We worked down the center of the boat. One worked the forward part and one worked the stern part.

Q. You don't remember which end you worked?

A. Offhand, I would say no. I am not sure which end I did work, because I was in the water all the time and so was he. We were not in diving apparatus. We were in fins and masks, just making free dives.

Mr. Dow:

Thank you. Unless the Court has some questions you will be excused.

The Court:

No, sir. You are excused.

(Witness excused.)

JOSEPH F. MORAN, was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):

Q. I want you to keep your voice up and address yourself to the Court, not to me. I only ask the questions. Now, give your full name and address to the stenographer.

A. Joseph F. Moran. 620 Northeast 5th Street. Hialeah.

Q. You will have to talk louder than that, so everyone in the Courtroom can hear you. By whom are you employed, Captain?

A. Tropical Marine Products.

Q. Raise your voice and talk to the Court. How long have you worked for them?

A. About two years and a few more months.

Q. Did you work for their predecessor in interest there, Mr. Barba?

A. Yes, I did, for maybe four or five months.

Q. Ever since you have worked for the plaintiff in this case, Tropical Marine?

A. Yes, I have.

Q. Did you by any chance work on the Sea Pak while she was being rebuilt in Miami?

A. Yes, I did.

Q. When you first saw the Sea Pak what condition was she in? Had she been completed and ready for sea or was she just started, or what?

A. She had already been put back in the water. They were installing the refrigeration system when I came aboard.

Q. Talk to the Court, please. You were present while they installed the refrigeration system?

A. Yes, I was.

Q. What else?

A. Engine work, cabins, trimming up; things like that.

Q. Did you ever see a surveyor down there?

A. Well, I saw several people around there. They didn't work on the boat, but I don't know what they were.

Q. Did you ride her down to Caicos, or did you fly down?

A. I flew down.

Q. Will you tell the Court, Captain, your background as a seaman, how many years, and what you have done?

A. Well, I have been going to sea—

Q. Raise your voice and look at the Court.

A. I have been going to sea, you might say, most all my life, ever since I was of age enough to go on

every type of vessel, I guess, there is, towboats, big sailers, sail boats, schooners.

Q. Did you ever take over as captain of the Sea Pak during any incapacity of Captain Berlinski?

A. Yes, I did.

Q. Do you remember when it was and for how long, approximately?

A. Well, it was about a week. I don't remember when it was, but it was quite a long time ago.

Q. Did there come a time when Captain Berlinski returned to the United States?

A. Yes, there was.

Q. Do you know why he returned?

A. Well, rightly, I believe it was his vacation.

Q. You took over as captain of the Sea Pak?

A. Yes, I did.

Q. Do you know—I know it is a long time ago and you haven't seen your deposition, either, I suppose, have you?

A. No, I haven't.

Q. I haven't given it to you. Can you remember when you left the plant at Caicos, keeping in mind that it was Friday, the 13th of August, that the ship went down?

A. I believe it was on a Tuesday morning, I believe.

Q. What would that be, about the 9th or 10th?

A. About the 9th yes.

Q. Now, what type of fish were you after at that time?

A. Conch.

Q. How big an order were you out for? Did you have an order, or how much did you intend to get?

A. The manager told me they had an order for twelve thousand pounds.

Q. That is six ton?

A. Yes, sir.

Q. When you started out where did you go and how did things go?

A. Well, we left the harbor, the east harbor, and went down the length of Long Key, around between Long Key and Six Hills. There is a rather deep spot there we anchored at that is very favorable for conch fishing. We went in behind there and anchored, where we started to work from. We worked our way down below as we diminished the supply of conch on that reef.

Q. Then, I suppose the conch come back another day; is that the idea?

A. Yes, sir. You can go a week and maybe get the same amount in the same spot.

Q. Eventually, you proceeded somewhere else?

A. No. That is where I left from when I had trouble.

Q. How far was that from the plant?

A. Oh, six to eight miles.

Q. I am going to show you a chart and ask you if you will take this pencil—I will ask you if you recognize it?

A. Yes, sir.

Q. What is it?

A. It is a chart of East Harbor and Ambergris Cays.

Mr. Dow:

I wish, counsel, you would examine it carefully to see there are no marks of any kind on there.

Mr. Batchelor:

Is this some official publication?

Mr. Dow:
I don't know. It was just handed to me about two minutes ago.

The Witness:
Could I say something on that, please?

Mr. Dow:
Yes, I wish you would.

The Witness:
It was printed by the University of Texas on a survey by Edward Doran for the Cape Moseley Base.

Q. Where did you get it?
A. I borrowed it from the Commissioner in South Caicos.

Mr. Batchelor:
No objection, if you want to offer it in evidence.

Mr. Dow:
I think I should like to offer it and have it marked first before Mr. Moran marks it up.

(The chart of South Caicos and Ambergris Cays was thereupon received in evidence and marked "Plaintiff's Exhibit No. 2.")

(By Mr. Dow):
Q. Now, Captain, I would like, with the permission of the Court, if I may, to put it on the Bench, have you mark it so that the Court can follow you—

The Court:
Put it over there on the reporter's table.

(By Mr. Dow):

Q. I want you to come down here, please, and first point out to the Court the place where your plant was, where your base was, where you left from.

A. The base is approximately right there (indicating). That is where the plant is.

Q. Will you draw a little line up from there and mark it "plant", or something like that.

A. Al right (marking on exhibit).

Q. What is the scale of miles on here?

A. Five miles, I believe, is five inches.

Q. So, it is an inch to a mile?

A. Approximately.

Q. Now, will you draw a blue line from where the vessel was anchored when you departed on that last trip and trace your route to the point where you finally anchored and the trouble began?

A. We were anchored right here in the harbor. We left the harbor and came out through the cut down wide; we always swing wide of this Long Key, because it is a very nasty place.

Q. Make a good strong line there. Tell the Court anything about it you want to, as you go along.

A. We go in through this reef right here (indicating) and back into this deep hole here (indicating). It is coral and sand, and it makes a very good anchorage. I will draw an anchor there.

Q. Is that where you finally anchored?

A. Yes, sir.

Q. Is there any reason, Captain, that you could not go directly from that anchorage to the plant without going around Long Key?

A. Yes.

Q. If so, what is it?

A. This is a sand bar right here (indicating.) There is no water on it. At high tide there is two feet, approximately. Even our small boats can't cross it.

Q. What sort of a beach is over at the point nearest your anchorage?

A. Right here it is very sharp coral rock that goes right up to the water. At low tide there is about two feet of water, where it cuts off completely.

Q. What was the weight of the Sea Pak with all her equipment?

A. Roughly, around forty or fifty tons, complete.

The Court:

Is that all the reference you are going to make to this map?

Mr. Dow:

No, sir; one more.

Q. If you put that ship on this beach, in your opinion, is it a good place to land a ship?

A. No, sir. You wouldn't bury your bottom enough to work on it.

Q. So, if you put her up there what would happen to her, in your opinion?

A. You would take a chance of breaking her. You wouldn't even have enough depth to work on it.

Q. Between your anchorage and the plant, through the route which you were required to travel, what sort of a shore is there on the southeast side of Long Key, along which you had to pass to get to the plant?

A. That is all high cliffs, forty or fifty feet.

Q. There is no beach there at all: is that correct?

A. No, sir. That is deep water right to the cliff.

Q. That is shown here (indicating)?

A. Right. There is the reference right in the legend.

Q. What is this dotted line marked "A"?

A. That is your 100 fathom curve.

Q. Will you write on there "100 fathom curve"?

A. (Witness does as requested.)

Q. Then in parenthesis under there will you put "600 feet"?

A. (Witness does as requested.)

Q. Now, will you please make a mark somewhere on that blue line, an "X", if you will, at approximately the point where the vessel was lost, keeping in mind the scale of miles as being a mile to an inch?

A. Well, approximately—She was inside of that line when she was lost; I mean coming down. I swung wide out, my engines cutting off almost up to the harbor entrance. I drifted closer into the Key and down.

Q. Put an "X" approximately where you think it was.

A. (Witness does as requested.)

Q. You may resume the stand. I think that is about all on that. Now, Mr. Moran, will you tell the Court, not me, chronologically and in proper sequence about the time you first discovered the entrance of more water than usual, what drew your attention to it and what occurred from there on? Tell the gentleman sitting there, not me. Turn around.

A. Well, first, I will tell you the reason I discovered this leak. One bilge pump that I have, it runs always. It is a sef-priming pump; I mean it is a continuous priming pump. There is a stream of water that runs through the pump that keeps it

primed. Through the overboard discharge there is always a small stream of water coming through. When my attention was turned to it normally every once in a while it just caused a heavy squirt of water. I began to notice it began to pump a little more at a minute's duration, then a little longer and a little longer, with these intervals probably at first about an hour or an hour and a half apart.

Q. What day was this?

A. This was, I believe, on Thursday.

Q. If she sank on the 13th, when was it?

A. It would have been Thursday.

Q. You mean it would have been the 12th?

A. The 12th, yes, sir.

Q. At what time did you first notice it on the 12th, morning or afternoon?

A. Well, it was just after dinner, because I had been up the night before and I didn't get back on deck until right about dinnertime that day.

Q. Well, go ahead. So, in the afternoon of the 12th you noticed this. What did you do when you noticed it?

A. Well, I just checked on it. I didn't do anything immediately. I thought maybe being we were washing fish all the time there was a lot of water spillage, but it might have come from anything. When it continued to do that I went down and checked in the bilges and checked in the engineroom where this one pump is located. I didn't see any flow of water to be alarmed at. I just watched it. I checked my packing glands on both shafts to see if they might be leaking.

Q. That is where the shafts operate, go through the hull and go overboard?

A. They go through a bulkhead there under the galley wall and go through the walls, but there is a

valve in the bulkhead that would normally keep opening, so if there is any water does get in there it goes to this one sump.

Q. Did you discuss the matter with the engineer?

A. Oh, yes. I had him down there when I checked that, and he checked officially, seeing that she just didn't leak.

Q. When you are washing fish do you take water from the sea?

A. Yes.

Q. Some of that goes down into the bilges?

A. Sometimes you take some tubs, and the boys get a little careless once in a while and spill a tub, or something like that. Water is taken from the sea through a similar pump to the bilge pump. It goes through a wooden trough that is built on the after part of the ship. It has tables on both sides of it, and the water flows down that trough and overboard. When they are washing fish every once in a while you get a lot of slopping with these fish ships.

Q. Did there come a time when it seemed to be getting worse, and, if so, when was that?

A. That was late in the afternoon when I actually got worried about it, and began checking below. I had one period where she pumped on me for about five minutes. Then I went down there; naturally, the sump would be dry. I pulled all the floorboards in the engineroom to see if the water was coming from there, or where it was coming from. I noticed it was coming from forward, from the forward engineroom bulkhead. There is along there several perforations where the refrigeration goes through the bulkhead. I found it was coming from there. I went up forward to the forepeak. That is on the other side of this freeze box. It was dry up there. So the water I saw coming

was coming, evidently, from under this one freeze box that is forward of the engineroom. It was really a bad leak, because the pump could not keep up with it. We just kept our eye on it for a while. It got worse. I figured I would check the whole ship, because there might be something else. We checked it fore and aft, the engineer and I. The best way we could find it was under this forward freeze box, where we couldn't get underneath or to the sides of it of anywhere, because it is built right into the hull. We kept our eye on it for a while. It got toward ten, eleven or twelve o'clock at night, and got where it really worried me, so I decided I would take her on back into the plant. We have a longer, deeper beach there and I could put her up, and I could find out where the leak was coming from, because I couldn't get at the leak from the inside of the ship. I didn't want to go outside around the key at night on account of the reefs; it was a little tricky going through there, so I waited until the crack of day. About five o'clock I turned the crew to and we got under way from there. We had, I guess, about six tons of fish in the boxes.

Q. That is the forward freezer box from under which you thought the water was coming?

A. That is right. So, we got under way, I imagine, around five-thirty to six o'clock. We were going toward the reef. We went on up almost to the harbor entrance; in fact, in another twenty minutes I would have been in the harbor. I am a little ahead of myself. I began to gain water fast after I hit the sea. I turned the crew to and we opened the forward hold, that is, the forward freeze box and we dumped all the fish, trying to lighten her up, because the freeze box was forward and the leak was forward. I thought

maybe I could ease up on the pressure of the water. So, the water kept rising and catching up on us. I turned on the wash pump, which is an electric pump. I like that for pumping the bilge.

Q. That wash pump is what you wash fish with; is that correct?

A. Yes. I worked that pumping the bilge, plus the other bilge pump. The bilge pump run on the engine. They sucked dry and they would quit. When I got about a mile from the plant I was getting water pretty heavy in the engineroom; in fact, it began to flood the floor boards. I thought maybe if I could ease up on the engines I would be all right, so I slowed the engines down a bit. I had it hit up pretty high, because the way the sea rolls if you go in at an angle it drives your boat hard toward the tip of Long Key's rocks, so I went out with it and then I hea led down toward the harbor. I was broadside to the ea, and I lost my engines because of the water slushing up on the sides of the engine beds and the sides of the engine itself. It splashed up and knocked my engines down.

Q. How did it do that? You mean drowned the ignition system?

A. It drowned the ignition system, which is very low on that type of engines. I got them started again, but they only lasted about five minutes, and we started drifting back out and the wind started carrying us down to where we came from.

Q. Did you drop your anchor?

A. Not at this time I didn't. I was still out too far, in a hundred fathoms of water. I didn't have that much chain.

Q. How much chain did you have?

A. I had approximately three hundred feet, to my knowledge.

Q. How deep was the water there?

A. Six hundred feet.

Q. Go ahead.

A. So, all the time I thought that maybe the runabout, which was due out long before—We have a small motor boat, which I had sent in a couple of days before, or the day before, rather, and I figured they were supposed to have been out early that morning.

Q. What did you send that boat in for?

A. For supplies. I had figured on sending her in at the end of the week, but the boys that were fishing were getting far more fish than I expected at that one point. Before I moved on I figured I might load on my cardboard boxes and cellophane to box them with, before I moved on.

Q. In the Sea Pak you chilled them, froze them, washed them and packaged them already to go; is that right?

A. Yes, sir. They were ready for the cargo plane when they got ashore.

Q. The runabout, as you call it, or whatever it was, that little boat, could it go directly across to the plant inside of Long Key?

A. Yes, sir. It was an LCVP.

Q. How much water did it draw?

A. Two feet.

Q. That was shallow enough to get over there?

A. Yes, sir.

Q. You couldn't do it?

A. No, sir.

Q. How much water did you draw?

A. Well, with a load of fish on her she drew about six feet.

Q. Go ahead.

A. Well—

Q. The engines drowned out and you were drifting. How was the wind?

A. The wind was out of the south, southeast. It was more out of the south.

Q. What are the characteristics of this area, so far as wind is concerned? Does it have definite characteristics of weather there?

A. Yes, sir.

Q. Tell the Court, and not me, when the wind comes up or dies down how it seems to operate.

A. The wind comes up very fresh in the morning and dies out during the evening or during the night, but in the morning, oh, around six o'clock, five o'clock, five o'clock, or like that, it springs up fresh; it gradually increases and about ten o'clock it gets pretty brisk the majority of the year.

Q. That is because of the sound, isn't it?

A. Yes, sir. The way that Long Key sets in relation to the open ocean there it causes—between that and the tide, it causes a bad reef all along that shore and a bad sea, which breaks. I have seen it myself break over Long Key, which is forty feet in most places.

Q. Tell the Court what happened that morning with respect to the weather and how it affected you at the time when your engines drowned out.

A. Well, it carried me back westward along Long Key. I had manned the hand pump. We had a 2-inch hand pump. I had the boys operating on them. All of this time I was drifting back. She began to settle by the head and to the port. She turned completely broadside of the sea, and she would straighten out. I let the anchor go; I figured it might hook onto something and not drift out into the reef. I figured it would hold it until the runabout come out. I thought maybe the runabout could come out and take us off.

Q. In the event she didn't sink the anchor might keep her from being pushed against Long Key?

A. That is correct. The runabout didn't get there and the boat turned completely on its side; the port side was completely under. I told the boys to get in the dinghy and get off. There was no use of risking any life. We got in the sea, and the sea was running; we couldn't make any headway; we had to go with it. We went back around the tip, back to where we were anchored, and the runabout came out, I guess, half an hour after we got ashore ourselves, and they circled around her. She was lying on her side. They circled around her and then they came on around the tip of the key where we were. We all got aboard the runabout, and went on on the inside route back to the plant. We figured maybe we could get hold of—we had a big gasoline pump at the plant—get some fuel in the runabout and get on down and might be able to do something. Just as we started out of the harbor she went under.

Q. How high was the sea at that time?

A. The sea was running about six feet.

Q. How much wind did you have?

A. I had about a force 3 wind, about thirty miles an hour.

Q. In the year you were there before the loss of that vessel did you have any knowledge of her condition?

A. Well, the little bit that I was connected with it at the time. Most of the work I was doing was at the plant. Every once in a while when she came in the harbor I would go and help Captain Berlinski work on some part of the machinery, or anything like that. As far as running the boat, I didn't interfere with him. I didn't interfere with that boat at all. That was his business.

Q. Did you have an opinion as to whether or not she was kept up or not kept up?

Mr. Matchelor:
I object, Your Honor. I think he should testify to the facts he knows.

The Court:
Whether it was kept up?

Mr. Batchelor:
Yes, sir.

The Court:
Objection sustained.

(By Mr. Dow):
Q. From time to time did the Captain request parts or equipment for the ship?
A. Oh, yes, sir.
Q. Do you know whether or not he received them?
A. Yes, sir, he did.
Q. Was there ever anything he ever wanted that he didn't get, to your knowledge?
A. Not to my knowledge.
Q. Is the same true of your own experience with the ship?
A. Yes, sir.
Q. So that any time when you were captain of her you had what you wanted?
A. Yes, sir.
Q. Were you satisfied in your own mind that she was seaworthy?
A. Yes, I was.

Mr. Batchelor:
The same objection.

The Court:
Well, that would involve whether he knows what seaworthy is.

Mr. Batchelor:
Yes, sir.

The Court:
Do you?

The Witness:
Yes, sir, I do.

The Court:
What do you say about it?

The Witness:
Well, the condition of the ship and the hull and the equipment, that it was sound.

(By Mr. Dow):
Q. That what was sound?
A. All of the equipment and the hull and every thing that goes with it.
Q. What is the difference between a sound hull and an unsound hull?
A. A sound hull, your timber is still hard; your fastenings are good. An unsound hull, you are a little soft; the planking is soft in spots.
Q. Maybe you have got holes in her, too?
A. Possibly.

The Court:

That would make it unseaworthy, wouldn't it?

The Witness:

Very much so.

The Court:

What about holes in the hull?

The Witness:

I didn't know of any holes.

(By Mr. Dow):

Q. Do you consider the overboard intake or discharge, intake or outlet, whether they are in use or plugged—do you consider those holes?

A. No, I don't.

Q. So, when you speak of holes, you are speaking of a hole that has been caused by some outside force; is that what you mean?

A. A punctured timber.

Q. Tell the Court the difference between the two. If something was punched with a rock how does it differ from a discharge line?

A. Well, a hole that would be punctured from a rock would not necessarily be round, like you would normally call a hole. A hole would be something more or less bored or punched through with something. A rock would be crushing and punctured, irreguar or ragged. It wouldn't only puncture it, it would spring the planking and crack it where it would let the water in and not make a hole you could run your hand in or anything else.

Q. In other words, you might have a fracture of a plank?

A. That is correct.

Q. A fracture of a plank would admit water, which you don't think you could see; is that it?

A. That is very possible you wouldn't see it.

Questions by The Court:

Q. What if this boat hit some coral rock at some time there, would that make a hole in it so it would leak?

A. Well, a vessel of that heft or that weight, if you hit coral rock it would either puncture or rupture a plank. If it punched a hole in it it would be very obvious right away, because our bilges are comparatively shallow and you would notice the water quick. If she punched a round hole in her you would know it. If she ruptured a plank, well, if it didn't leak you wouldn't know it.

Q. Well, couldn't you scrape against one of those rocks or coral, or whatever you call them, so the boards would be loosened and let the water in graduaIy?

A. If you ruptured a plank or fractured a plank, and you hit it square in the center of the plank, and whatever you hit was small enough in diameter it didn't touch the other two planks, it might separate it.

Q. Do you know of any instance where scraping against rock or coral caused the plank to separate so as to let water in it?

A. No, sir.

Q. You never heard of that?

A. No, sir, but you might in other places.

Q. Do you know if that is a frequent occurrence or whatever that happens at all?

A. When you are running aground or something like that, that is very apt to happen.

(By Mr. Dow):

Q. Did it ever happen to the Sea Pak that you know of?

A. Not that I know of. Our anchorages are deep and the places we run the boat are fairly deep. In fact, you come up against rock and you don't go away from it; you leave it there. That is the type of rock we have down there. You call it flint coral.

Q. If you hit one you know it?

A. You know it, yes, sir. That is where you leave it.

Q. If you hit it that is where you are going to leave the ship?

A. If you run aground you come very gently to a stop. If you come against one of those heads you are there; that is it, because they raise straight up. That is it; if you hit them you hit them.

Q. So far as you know, that never happened to her?

A. No, sir.

Q. While you were skipper or while Captain Berlinski was, so far as you know?

A. So far as I know, no.

The Court:

May I ask the witness the question, what caused the leak to get into the boat?

The Witness:

Well, I don't know that. I understood there was—

The Court:

You don't know. All right.

Mr. Dow:

May I pursue that same thought?

Q. From the sequence of events as you noticed them and as you have related them here, do you have any idea, Captain Moran, what may have caused it?

Mr. Batchelor:

We object to the speculation. The witness has testified he doesn't know. We are now in the realm of speculation.

The Court:

That would be speculation.

Mr. Dow:

I agree, but no man has a better right to speculate on a thing of that kind than the captain of the ship himself. It may be—

The Court:

How much weight do you think I should give to his speculation?

Mr. Dow:

You don't have to give one single ounce of weight to it, because if the vessel is lost, as described by Captain Moran, what caused her to go down is of no concern to anybody, and without debating the point here I submit that our memorandum of law that is contained in our trial memorandum gives our position on that, and on that we are willing to stand.

The Court:

Very well. Have you finished with the witness?

Mr. Dow:
Yes, sir, I have.

The Court:
Any cross?

Mr. Batchelor:
Yes, sir.

The Court:
All right.

Cross Examination.

(By Mr. Batchelor):

Q. This vessel went down on Friday, I believe. Is that correct?

A. Yes, sir.

Q. I believe you left Caicos harbor to make this voyage around to the anchorage on Monday; is that correct?

A. I believe it was Tuesday. It was so long ago—

The Court:
He said Tuesday on direct examination.

(By Mr. Batchelor):

Q. I am trying to refresh your recollection a little bit here. Do you have any present recollection now as to what date it was?

A. Well, it has been so long ago. As I said, I believe it was on a Tuesday.

Q. Captain, you remember testifying in a deposition in Mr. Willner's office in May, do you not, in this case?

A. Yes, sir.

Q. Do you remember this question: "To refresh your recollection on dates, if you can. I know it was some time ago. The vessel went down on the 13th of August. Can you tell us when you left the plant to go out on her last trip? Answer: I don't remember. It must have been the 9th. I believe it was a Monday." Does that serve to refresh your recollection any?

A. I don't remember the question and the answer. Like I say, it has been so long ago. I have too much to do.

Q. It was either Monday or Tuesday?

A. It was either Monday or Tuesday. That is what I said.

Q. You left Caicos harbor and went around the end of Long Key to this anchorage?

A. That is right.

Q. That is about an eight-mile trip, more or less?

A. Yes, sir.

Q. How long would it take you to run down there?

A. An hour.

Q. Did you have any difficulty at all on that trip?

A. Going down?

Q. Yes, sir.

A. No, sir.

Q. No difficulty from the weather?

A. No, sir.

Q. You didn't run aground on anything?

A. Not out there.

Q. You remained anchored in the lee of Long Island until 5:00 a.m. on Friday morning when you headed back?

A. Yes, sir.

Q. You remained anchored in one spot?

A. Yes, sir.

Q. Now, Captain, what was the state of the sea in that anchorage where you were while you were there for those three or four days?

A. Well, that is a very good lee in there. At the worst we would get a long roll sometimes and maybe a swell every once in a whie, but other than that it is a pretty good lee.

Q. No rough seas in there at all while you were on this trip?

A. No, sir.

Q. What time was it when you said you first noticed the water start coming in?

A. Well, when I came on deck about noon. After dinner about noon on Thursday I was in there checking the fish when I noticed it. It just caught my eye, because I happened to be standing near the overboard discharge. It squirted some water out.

Q. Did you look down in the bilge at that time to see how much water was in there?

A. No, I didn't.

Q. You say this was about noon on Thursday?

A. Yes, sir.

Q. When the water began to come in rather heavily, in other words, when it began to give you some concern, what time was it when it got to that stage, do you recall?

A. When it really got me worried was about ten o'clock that night.

Q. Did you notice any increase during the afternoon in the amount of water that was coming in?

A. No, sir.

Q. Did the leaking get progressively worse as the afternoon and the night wore on?

A. Yes, it did.

Q. When you took up anchor the next morning and attempted to get back to Caicos Harbor did you consider that the seas which you encountered when you got around on the seaward side of Long Island were enough to normally give a boat like this any difficulty or trouble in going through them?

A. That sea right at Long Island always gives you trouble, because it is very sharp and steep. It comes up from absolutely deep water to forty feet out of water. It always gives you trouble through there.

Q. The seas that you encountered on this particular trip, would they normally be enough to bother this boat or damage it, to keep it from getting through?

A. No, sir.

Q. They were the type of seas you would usually expect to find in that area; is that right?

A. Right at that point there, yes, sir.

Q. You had been through them before, had you not?

A. Yes, sir.

Q. With no difficulty at all?

A. No difficulty at all.

Q. Seas just like you had that day?

A. Right.

Q. When you left the boat what did you leave in? When you abandoned ship what did you leave in?

A. We had a little plywood dinghy we always towed astern.

Q. How long was it?

A. Fourteen feet.

Q. That was being towed astern that morning?

A. We always towed it astern.

Q. How many were there in the crew that morning on board?

A. Five of us.

Q. Who were they?

A. There was Mr. Rothstein, the manager, Henry Mills, the engineer, Roy Jennings and myself.

Q. Four?

A. Four, yes.

Q. You all got in the 14-foot dinghy?

A. Yes, sir.

Q. Where did you row ashore?

A. Around the tip of Long Key, down approximately where we were anchored.

Q. In other words, you got in the dinghy at the point of this blue "X" here off of Long Key, and rowed down around the point back in the neighborhood of where you were anchored?

A. Yes, sir.

Q. Did you ever see the bottom of this ship?

A. The Sea Pak?

Q. Yes, sir.

A. No, I haven't.

Q. You have never seen her bottom at any time?

A. Not that one ship, no.

Q. You don't know what the fastenings looked like in her, do you?

A. No. I wasn't aboard when they put in the fastenings.

Q. I am referring more particularly to the next year following, the time she sank.

A. I know what they looked like from the inside.

Q. You don't know what the outside of the planks looked like?

A. Not on the bottom.

Q. Do you know whether there was any paint on the outside of this boat at the time she went down?

A. She was very well painted.

Q. The bottom of the boat was well painted?

A. I don't know about the bottom.

Q. I am referring to below the waterline.

A. From what I could see when she rolled she had plenty of paint on her.

Q. How deep was the water where you anchored in the lee of Long Island for those three or four days?

A. Approximately fifteen feet.

Mr. Batchelor:

That is all.

Re-Direct Examination.

(By Mr. Dow):

Q. Was Roy Jennings—What was his capacity aboard the ship?

A. Cook.

Q. He was a local colored native; is that correct?

A. That is correct.

Q. Henry Mills, who was the engineer, was the same?

A. Yes, sir.

Mr. Dow:

That is all.

The Court:

Let me ask you a question.

Q. From what you observed there this water that came out, and as you inspected—What do you call it, the bilge?

A. The bilge.

Q. From time to time you made several inspections down there, didn't you?

A. Yes, sir.

Q. Do you have any idea whether that water started coming in slowly and then increased in volume as time went along?

A. That is what it did. It didn't bother me too much at first, but then when it began to increase on me that is when I got worried.

Q. It started from a small amount coming through and then it got more and more, something like a river breaking through a levee; it starts with a small stream and then gets larger?

A. Yes, sir. When it got outside and hit the sea is when it really started going.

Q. Have you ever known that to happen before, a thing like that, to the ship?

A. That never happened to me before.

Q. You wouldn't know, then, how that sort of thing generally occurred?

A. Well, I have had it happen in companies I worked with on barges and things like that. A leak started around a fastening where the wood had rotted and the water finally got through. It got a big enough hole where the water would carry away the rotted wood and really get into a fair sized leak.

The Court:

All right. That is all.

Mr. Dow:

That is all.

(Witness excused.)

Mr. Dow:

At this time I would like to offer in evidence the deposition taken of Henry Mills, the engineer.

The Court:
All right.

Mr. Dow:
Which I understood is on file with the Court.

The Court:
Very well. Would you read it at this time?

Mr. Dow:
I don't know. Some judges like to have them read and some of them like to read them themselves rather than take the time. I will do whatever Your Honor wishes.

The Court:
Our calendar is so full we don't have the time to go through them, so you had better read it now.

Mr. Dow:
Certainly. This deposition was taken pursuant to stipulation between counsel. The signing, sealing and notice of filing was waived. The witness was sworn, and as in all of these depositions, all of the witnesses except counsel and Mr. Willner, of Tropical Marine Produces, were excluded, so there were no other people of this nature in the room.

HENRY MILLS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified by deposition as follows:

"Direct Examination.

'(By Mr. Dow):

"Q. State your full name.

"A. Henry Mills.

"Q. What is your address?

"A. Pelican Harbor, South Cay.

"Q. How old are you, Henry?

"A. Seventeen.

"Q. Whom do you work for?

"A. The Turks Island Salt Company at first, and then Tropical Products.

"Q. I understand you were acting as engineer of the Sea Pak at the time she was lost?

"A. Yes.

"Q. How long have you been running engines on boats, Henry?

"A. For about three years, I would say.

"Q. Whom did you learn that from, Henry?

"A. My father.

"Q. What does your father do?

"A. He is Chief Mechanic for the Turks Island Company.

"Q. Would you say you understood the engines of the Sea Pak?

"A. Yes, sir.

"Q. Do you know the difference between the operation of gas and diesel engines?

"A. Yes.

"Q. You can operate either one?

"A. Yes, sir.

"Q. Do you know the difference between the various volt generators?

"A. Yes, sir.

"Q. You understand that, too?

"A. Yes, sir.

"Q. How far did you go through school?

"A. As high as the 6th grade. That's the highest they got.

"Q. Henry, can you read and write?

"A. Yes, sir.

"Q. How long had you been the engineer of the Sea Pak?

"A. Pretty close to two years, about a year and some.

"Q. Did you ever have any difficulty in the operation of any of her equipment?

"A. Not much, just slightly, but not much.

"Q. Was your difficulty because you had to repair something, or difficulty because you didn't understand it?

"A. It was a little difficult to repair a few parts.

"Q. What repairs did you have to do?

"A. Such as take the clutch off the engine and get to the gears, that was difficult.

"Q. You did it all right?

"A. Yes, sir.

"Q. How long before she was lost did you do that?

"A. About eight months.

"Q. She ran all right after that?

"A. Yes, sir.

"Q. Did you ever make any repairs to anything that you had trouble with after you did it?

"A. No, sir.

"Q. What pumps did she have?

"A. A regular hand pump. That was the only pump she came with. Later on we installed a pump, 271 diesel engine.

"Q. That engine ran the freezer box?

"A. Yes, sir.

"Q. How often did the pump run?

"A. It was running all the time. It was continuously running, but that does not mean pumping. If there was water in the bilge, it would start pumping.

"Q. What other pumps did she have?

"A. That was all, except the regular hand pump.

"Q. Did she have a pump on the main engine?"

Mr. Batchelor:

We withdraw the objection.

"The Witness:

That was for cooling the engine.

"(By Mr. Dow):

"Q. Was there an intake from the bilge there?

"A. Yes, sir.

"Q How did that operate?

"A That was a gear driven pump mounted on the engine. It had an intake that went onto the pump and actually pushed the water to the engines where it was needed to cool them, and then overboard.

"Q. The main engine pump sucked the water out of the bilge to cool the engines?

"A. It was from outside, from the sea.

"Q. Wouldn't that suck the water from inside the boat?

"A. No, sir.

"Q. You are sure of that?

"A. Yes.

'Q. Did you have a galley pump as well?

"A. Yes, that was for the refrigeration box.

"Q. Could that be hooked up to take water out of the bilge?

"A. Yes.

"Q. Did you ever use it for that purpose?

"A. Yes, the day she was sinking, we did.

"Q. Can you tell us, if you remember, and I can help you by saying she went down on the morning of the 13th of August, 1954, can you tell us when you first noticed any water in the bilge?

"A. Well, we were out at anchor. We were getting a little wash. She sank on the 13th, right? On the 12th, the evening of the 12th, I noticed she was getting water in the bilge.

"Q. Did you always get water in the bilge?

"A. Yes, sir.

"Q. Would a fair term for that be seepage?

"A. Yes, sir.

"Q. Do you find that wooden boats normally take water in now and then?

"A. Yes, sir.

"Q. On the evening of the 12th, you found a little more than usual?

"A. Yes, sir.

"Q. In your own words, describe for us approximately what time of the evening you noticed it, and if it got worse, when it got worse, and what followed.

"A. I noticed it about 7:00 or 8:00 that evening.

"Q. You had not noticed it in the afternoon?

"A. No, sir.

"Q. Did you look for water?

"A. Yes, but could not find any.

"Q. Where did you look?

"A. In the engine room. I checked all the valves. They looked all right. I looked way back in the rear, and that was all right. We went to bed and left it like that.

"Q. Who did?

"A. Everybody, except one of us watches the engines.

"Q. Who stayed up when you went to bed?

"A. The Captain. When he goes to bed, I stay up.

"Q. When were you called?

"A. About 4:00 in the morning. He said the leak was getting worse, and that we better put it on the beach and see what to do. I got up right away.

"Q. Could you have beached her there?

"A. No, sir, I don't think it was possible to beach her there.

"Q. What would happen if you did?

"A. You could not get her high and dry. The water is too deep that way, and you just couldn't make it.

"Q. Are there any rocks there?

"A. There are a lot of conch shells.

"Q. You got under way?

"A. Yes.

"Q. Did it take long?

"A. No, we just started the engines, got the anchor, and got under way.

"Q. What did you notice about the water after you got under way?

"A. It was coming in a little more than before. We got on the pumps and tried to pump it out. After we got out further, one engine quit. I looked to find out what was the matter. Water had come up between the engines and flooded the magneto out. We could not get them firing.

"Q. Did you get started again?

"A. Yes, but it didn't run long before it stopped again.

"Q. How much water was there then?

"A. Water was coming about the engines.

"Q. Where were you in relation to the harbor entrance when that happened?

"A. About a half a mile out.

"Q. How deep was the water in the boat's bottom then?

"A. It was about six inches above the water line.

"Q. Was she riding on an even keel?

"A. No, she began to list on the port side by then.

"Q. Which way was the wind and tide carrying you?

"A. Back towards Long Key.

"Q. What did you do then?

"A. We dumped all the cargo and had all the pumps working, but it was no use. We began to drift back, so we threw the anchor overboard to see if it would hold. We tried to call the plant to get another boat to come out and pull us in, but we didn't get any answer.

"Q. The Captain eventually ordered you in the dinghy?

"A. We tried to do what we could. Then he said that we might better try to get to shore as she was getting very heavy.

"Q. What was the condition of the Sea Pak then?

"A. She was listing heavy to port, getting ready to sink.

"Q. Was the port gunnel under water?

"A. Just about.

"Q. And where did you go when you got in the boat?

"A. We ran around to the outside of the island where it was smooth and got on land.

"Q. How far away was that?

"A. Two miles, two and a half miles.

"Q. Did the boat come out from the plant after a while?

"A. Yes, it did. Some people on land noticed the Sea Pak having engine trouble, but didn't know she was sinking. They noticed her drifting. They called the man and he sent the boat, but by then it was too late.

"Q. Had you ever seen the ship leak like that before?

"A. No.

"Q. Had you ever had leakage before?

"A. No, not that I know of. We would get a little bit of water now and then, but it wasn't considered out of the ordinary.

"Q. You mean seepage?

"A. Yes.

"Q. Had you ever had difficulty pumping it out before?

"A. No, sir, no difficulty.

"Q. The automatic pump took care of it?

"A. Yes.

"Q. How often did it operate? How often did it suck any water?

"A. Every two hours, possibly a little bit of water. Just one spot and that's it.

"Q. In the period of time you were aboard this ship, you were all over her?

"A. Yes.

"Q. All over her as far as you could get?

"A. Yes.

"Q. Did you ever find any bad planking in the hull?

"A. No, sir. I never found any bad ones.

"Q. Did you ever find any loose fastenings?

"A. No, I never did, but I think the Captain found one or two loose ones.

"Q. Where was that?"

The Court:

What is that, stanchions?

Mr. Dow:

Fastenings. Fastenings are 3-inch bolts with a broad head on the end, which hold the planking to the ribs.

The Court:

All right.

"A. I think he got them from forward.

"Q. When was that?

"A. That was about—that was when the Captain noticed it was getting worse that day.

"Q. You mean the day before?

"A. Yes.

"Q. He found loose screws?

"A. They were in the bilge.

"Q. Whereabouts in the bilge?

"A. Up in the forward end.

"Q. And water was coming in there?

"A. No. He figured the screws might have been dropped there or something.

"Q. You mean they were just screws lying in the bottom of the bilge?

"A. Yes.

"Q. You often find nuts, bolts, screws, washers and everything else in the bilge?

"A. Yes.

"Q. Where he found them, there was no water coming in, anyway?

"A. No, sir.

"Q. At some time prior to the loss of the ship, I understand there were a couple of divers looking over the pattern of fishing?

"A. Yes.

"Q. Did they eventually make an examination, to your knowledge, of the bottom of the hull?

"A. Yes, they had an examination.

"Q. You were aboard at the time?

"A. Yes, sir.

"Q. What did they do? How many were there?

"A. Two.

"Q. Did they operate one at a time?

"A. They were both down at the same time.

"Q. Did they start forward and go aft, or start aft and go forward?

"A. Forward and then aft, then aft and forward.

"Q. Did you talk to them?

"A. No.

"Q. Did you hear them talk to anybody?

"A. I heard them say they found a little hole and a piece of wood.

"Q. How big was the piece of wood?

"A. As big as your finger.

"Q. Do you know where they put the piece of wood?

"A. I think they did put it up on the forward end of the ship on the port side.

"Q. Did they take a hammer with them?

"A. They had one hammer, yes.

"Q. Are you sure that it was to plug a hole?

"A. They didn't say exactly. They just said they were going to put it in a hole.

"Q. Do you know anything about the hole they put it in?

"A. No, sir.

"Q. You don't know whether it was a hole in the planking or the end of a pipe?

"A. No.

"Q. Do you know if they did put it in?

"A. No, sir, I don't know exactly whether they put it in or not.

"Q. After this occurred, did Mr. Batchelor, who is sitting here with me, visit the island?

"A. Yes, he did.

"Q. And did you talk to him?

"A. Yes, sir, I had a little talk with him.

"Q. When he came out to the island, when was the first you knew about it?

"A. I was out working and one of the police came and called me and said the Commissioner wanted to see me.

"Q. One of the police?

"A. Yes. I went to the office and the Commissioner told me these men wanted to question me.

"Q. Who were the men? Were you told who they were?

"A. They didn't tell me the names.

"Q. Did they tell you whom they represented?

"A. No.

"Q. There were just the men, the Commissioner and the police?

"A. Just the men, Commissioner and the police.

"Q. How many were there?

"A. This man (indicating Mr. Batchelor) and another man.

"Q. Was any friends of yours there at the time?

"A. No, sir.

"Q. Who did the questioning, this man (indicating Mr. Batchelor) or the other man?

"A. The other man.

"Q. What was the first thing he said to you?

"A. He asked me why I sank the ship.

"Q. He asked you why you sank the ship?

"A. Yes. I told him that I didn't sink the ship. I told him I didn't believe anybody sank the ship, that she just went down.

"Q. What other questions did he ask you?

"A. How long I was on the ship, what was my job aboard ship, what condition the ship was in.

"Q. Were those questions very similar to those I have asked you here today?

"A. Yes, sir.

"Q. They were along the same line?

"A. Yes.

"Q. Did you give about the same answers?

"A. I think I did, sir.

"Q. Was anything written down about all this?

"A. Yes, they wrote it down.

"Q. Who wrote it down?

"A. This man here.

"Q. You mean Mr. Batchelor?

"A. Yes.

"Q. You never knew his name until just now?

"A. Not until just now, yes.

"Q. Did he write it in longhand or type it?

"A. In the office in longhand, and they took it over to the plant and wrote it on the typewriter.

"Q. Did they ask you to sign it?

"A. Yes, sir. I did sign it.

"Q. You did sign it?

"A. Yes, sir, I did.

"Q. Did you read it first?

"A. Yes, sir, but not carefully. I just raced over it and signed it.

"Q. Why didn't you read it carefully?

"A. Because I was afraid.

"Q. Had you ever been questioned before?

"A. No, sir.

"Q. You had never been in trouble with the police before?

"A. No, sir.

"Q. You have always been a good boy?

"A. Yes, sir.

"Q. Do you know, of your own knowledge, if they questioned anybody else?

"A. Yes, the cook. He was on the boat when she sank. They questioned him. They also questioned the fellow who was the mate. He didn't come in for a couple of hours, but they waited and questioned him, too.

"Q. Mr. Lightbourn?

"A. Yes.

"Q. Do you know whether or not they signed any statements?

"A. I didn't notice.

"Mr. Dow:

I call for the production of any and all statements taken from these witnesses at that time."

Mr. Batchelor:

Which request for production was denied by the Judge.

The Court:
The production of what?

Mr. Dow:
The production of the statements that were taken from these boys down there by the people who went down at that time. It was some months after the accident. It was in October, wasn't it, Mr. Batchelor?

Mr. Batchelor:
Yes, sir; two months after the accident.

Mr. Dow:
There was no notice to the assured, was there, Mr. Batchelor, that you were going down there?

Mr. Batchelor:
I am not on the witness stand, Mr. Dow.

Mr. Dow:
I think that is a fair question. Did you give any notice to the assured at the time, before you went down, or did you just suddenly appear there?

The Court:
Proceed with the deposition.

"(By Mr. Dow):
"Q. I show you this cardboard and ask you what it is."

Mr. Dow:
I think that is with the original deposition. It is a little chart of the island, similar—

The Court:
Will it be cumulative of the map or plat that is already in here?

Mr. Dow:
Here it is. It speaks for itself.

"(By Mr. Dow):
"Q. I show you this cardboard and ask you what it is.
"A. It is a chart.
"Q. At my request, you drew that last night?
"A. Yes, sir.
"Q. I didn't ask you, you drew it yourself, didn't you?
"A. Yes, sir.
"Q. Is it pretty much to scale?
"A. Yes, sir.
"Q. Where did you learn to draw a chart of the Islands?
"A. In school.
"Q. The students do that there?
"A. Yes.

"Mr. Dow:
"I offer it in evidence as Plaintiff's Exhibit No. 4."

The Court:
He didn't do a bad job, if that is a good map over there.

Mr. Batchelor:
No, sir. We have no objection.

(Chart prepared by Witness Henry Mills was thereupon received in evidence and marked "Plaintiffs Exhibit No. 3.")

Mr. Batchelor:

This is the cross examination:

"(By Mr. Batchelor):

"Q. Henry, will you describe what this other gentleman with me looked like, the one who asked the questions?

"A. He was a big, fat man, with a big stomach.

"Q. You, of course, know Mr. Westwood?

"A. Yes, sir. He is the District Commissioner.

"Q. And he is the manager of the salt company there?

"A. Yes.

"Q. He has been there as long as you can remember?

"A. Yes.

"Q. You have known him all your life?

"A. Yes, sir.

"Q. Mr. Westwood was present when you were asked these questions up in his office?

"A. Yes, sir.

"Q. When you said the Commissioner sent word for you to come up, that was Mr. Westwood you were talking about?

"A. Yes, sir.

"Q. This statement you signed was signed in front of Mr. Westwood?

"A. Yes.

"Q. He signed it as Justice of the Peace and as a witness, didn't he?

"A. Yes, sir.

"Q. You had been on the Sea Pak ever since she came down there, hadn't you, Henry, as engineer?

"A. Yes, sir.

"Q. Had you ever had an opportunity to go over the side and see what her hull looked like from the outside?

"A. In shallow water you look for moss and stuff like that.

"Q. Did you ever do any cleaning or scraping on the bottom of the ship?

"A. Yes, sir. We cleaned a little.

"Q. Who helped you? Did the Captain help you?

"A. No. Me and the mate, Bruce Lightbourn.

"Q. How did you go about cleaning the bottom of the boat?

"A. You take a brush and go from aft forward and back along a rope.

"Q. Is that a scrub brush?

"A. Yes.

"Q. Did you go under the water line?

"A Yes

"Q How many times did you do that?

"A About two.

"Q. How long before the boat sank did you do that, Henry?

"A. I would say about five or six minutes."

The Court:

Five or six minutes?

Mr. Batchelor:

There has been a correction filed by the Court reporter on that. It is five or six months. I asked him to check his notes and he did.

"Q. Do you know if anybody else did any cleaning of the bottom since yiu were there about five or six months before?

"A. I don't know for sure.

"Q. You were on the boat at all times?

"A. There are times I was off.

"Q. You did not make every trip?

"A. Yes, but when we were in port, I would go home for a couple of hours.

"Q. Where was the boat the last time you scrubbed her?

"A. At Blue Hill, about 45 miles.

"Q. Were you able to pull her up in shallow water when you did that?

"A. Yes.

"Q. Before this last trip you took on the Sea Pak, how often did you have to pump her out when she was lying in the harbor with the automatic pump not in operation?

"A. Once every 24 hours.

"Q. How much water would collect in the bottom of the boat in a 24-hour period?

"A. I would say about 15 gallons.

"Q. How deep would it be? How high from the bottom of the bilge in a 24-hour period?

"A. About one-half inch.

"Q. In 24 hours, she would only collect one-half inch in the bottom of the bilge?

"A. Yes.

"Q. Had you noticed, or had the water ever been up over the floor board of the Sea Pak before the last trip when she sank?

"A. Not that I remember.

"Q. You don't remember water being up over the floor boards?

"A. No.

"Q. You testified the diver came out and asked for wood to put in a hole?

"A. Yes.

"Q. After that, did you notice any difference in the water in the boat?

"A. It didn't take any more or any less.

"Q. On this last trip you took on the Sea Pak, how were the engines operating?

"A. In good running condition.

"Q. Both of them were in good running condition?

"A. Yes.

"Q. They were both running when you came back in on the 31th?

"A. Yes.

"Q. There wasn't anything wrong with either one of them?

"A. No, sir.

"Q. While you were on the Sea Pak, had she ever been run aground that you recall?

"A. No.

"Q. Do you ever remember the boat hitting bottom or any of the rocks?

"A. No, sir.

"Q. Do you recall any collision with any other boat?

"A. No, sir.

"Q. I am going to hand you a document and ask you if that is your signature?

"A. Yes, sir.

"Q. That is your signature?

"A. Yes, sir."

Mr. Batchelor:

We ask it be marked for identification and attached to the exhibits at this time. I would like to have it marked for identification by the Court. It is attached to the exhibits. Any objection to removing it and handing it to the Court?

Mr. Dow:

None at all, but there are going to be a lot of objections to putting it in evidence.

Mr. Batchelor:

We haven't got to that yet. Suppose we mark it.

(The Statement of Henry Mills, dated October 16, 1954, was thereupon marked "Defendant's Exhibit No. 2 for Identification.")

"(By Mr. Batchelor):

"Q. You can read, can't you, Henry?

"A. Yes, sir.

"Q. You said you read this over at Caicos before you signed it. You said you read it here in the presence of Mr. Westwood?

"A. Yes.

"Q. At the time you saw me in South Caicos on October 16, 1954, in your statement did you say:—"

Mr. Dow:

Objection at this point. I object to counsel attempting to put in with the left hand what he can't do with the right and to read into evidence an objectionable statement, obtained under most objectionable circumstances.

Mr. Batchelor:

I am at a loss to understand Mr. Dow's statement that it is an objectionable statement. I am at a further loss to understand his statement it was obtained under objectionable circumstances.

Mr. Dow:

We offered to take you all down there to meet everybody. You came down unsuspectedly. I submit, Mr. Batchelor, that these poor, little simple-minded and thoroughly illiterate natives can be made to sign anything or agree with anybody about anything, as anyone who is familiar with them knows.

Mr. Batchelor:

Your opinion and my opinion of the natives differ. That is the very reason we had him sign it in the presence of the Commissioner of the Justice of the Peace. I think it is a question for this Court to determine after it is in evidence how much weight he wants to give to it.

Mr. Dow:

You can shoot one of those people in the presence of the Commissioner and he wouldn't mind it. I don't think those British Commissioners have any respect for the people under their charge.

The Court:

The question is would the rules of evidence permit it?

Mr. Batchelor:

The man has identified his signature. He stated he signed it and he read it before he signed it.

The Court:
I presume this will be a predicate for impeachment.

Mr. Batchelor:
It certainly is.

The Court:
Which is a well known procedure. There you must confront the witness with the time and place and circumstances and give him an opportunity to either admit it or deny it. Of course, it must be on material issues.

Mr. Dow:
There was no basis laid for it.

The Court:
This is the method for laying the predicate for impeachment. What, if anything, is there here to take this witness out of the realm of impeachment procedure? Isn't he subject to impeachment the same as any other witness?

Mr. Dow:
He is, but you must lay the proper foundation first. That was not done.

The Court:
You are correct. He must be and must have been familiarized with the occasion and the statement about which he has given contrary or contradictory testimony, so he will have an opportunity to remember and straighten himself out, or the two conflicting statements are submitted for the trier of the facts to

determine the weight to be given to his evidence at either time, or whether weight is to be given. Re read there how he was advised of the question.

Mr. Batchelor:
I first asked him the question:

"Q. You can read, can't you, Henry?
"A. Yes, sir.
"Q. You said you read this over at Caicos before you signed it. You said you read it here in the presence of Mr. Westwood?
'A. Yes.
"Q. At the time you saw me in South Caicos on October 16, 1954, in your statement did you say:—"

Then I quoted from it.

The Court:
Well, he remembers making the statement?

Mr. Batchelor:
Yes, sir. He has already identified his signature.

The Court:
I think so. Objection overruled.

Mr. Batchelor:
Quoting from the statement:

"'The vessel had been leaking for about six weeks before she sank. For about the first four weeks it was only necessary to pump her by hand about once every 24 hours. At the end of that time there would be about a foot and a half of water in the bilge. For the last two weeks before the ship sank we needed to use the

electric pump to pump her out. During the ten days before she sank the water got up over the floorboards several times.'

"A Maybe I did tell you so, but as I told you, I was so scared.

"Q. You told me that in South Caicos in the presence of Mr. Westwood, the Commissioner down there?

"A. Yes.

"Q. I ask you if you recall this that you told me down there and which appears in this statement:

"'For about the last five weeks before the Sea Pak sank we had been operating on one engine as we had taken parts from one of the cylinders of the other engine to use on the engine which we operated. We were running on the port engine during this time.' Do you remember telling me that?

"A. Did I tell you we rebuilt the port engine?

"Q. Did you tell me that for the last five weeks before she sank you had been operating on one engine?

"A. Before it sank we built up the other one.

"Q. When did you get the other one in operation?

"A. Maybe a week to three weeks before it sank.

"Q. I just want to get it straight. For about a five-week period, you were running on one engine, but you got both engines in operation at the time of the last trip?

"A. Yes.

"Mr. Batchelor:

"That's all."

Mr. Dow:

Your Honor, I wish that the gentleman who was with Mr. Batchelor was in the Courtroom now so you could see him.

Mr. Batchelor:

He will be here before the trial is over.

Mr. Dow:

I think he weighs something like 275 pounds. I think that is about right. I may be on the light side. I think this little 17-year old colored boy might have weighed one hundred pounds soaking wet. Would you not agree?

Mr. Batchelor:

Let's not argue the case now.

Mr. Dow:

I think it is a necessity.

Mr. Batchelor:

I understand this is the time to put in evidence.

Mr. Dow:

I want the Court to understand this.

The Court:

I understand.

"Re-Direct Examination.

"(By Mr. Dow):

"Q. Henry, this is a rather serious thing now. This statement which you signed says some things which

are not the same as the things you told us here today. What we want is what was the truth. You say here that you made every trip the Sea Pak made from the time you came aboard until she sank. Is that the truth?

"A. Yes, sir.

"Q. You say that she had been leaking for six weeks before she sank. Is that true?

"A. It was leaking a little bit, not badly. It was like any other vessel taking water.

"Q. Was she leaking more in those six weeks tan before that?

"A. Not that I know of. I wouldn't call it any more."

Mr. Willner:

Then Mr. Batchelor objected at this time.

Mr. Batchelor:

I will withdraw the objection.

"(By Mr. Dow):

"Q. What water came in six weeks before she sank, was the same as the six weeks before that?

"A. Yes.

"Q. Now, you say of these six weeks, for about the first four weeks, it was necessary to pump her by hand once over 24 hours, but at the end of that time, I dare say the last two weeks before she sank, at the end of that time there was a foot and a half of water in the bilge. Is that true?

"A. Maybe he determined that, but it would not be over a foot—not that I can remember."

The Court:

"Maybe he determined that"?

Mr. Dow:

The way it is, "Maybe he determined that." That is the surveyor. "—but it would not be over a foot—not that I can remember."

"Q. What is the most water she had prior to the time she sank?

"A. Never much over three or four inches.

"Q. Did you tell Mr. Batchelor that you had a foot and a half of water?

"A. I don't remember. I suppose I did.

"Q. Would you tell him that if it wasn't true?

'A. It never had over a foot of water that I know of.

"Q. Then, you would say, if it says here, it had a foot and a half in the bilge, it wasn't true?

"A. It wasn't true.

"Q. When you read that statement before you signed it, did you see where it said a foot and a half of water?

"A. I don't know what I signed, as I told you before. I was too scared. I didn't know what I seen.

"Q. Now, you say here, for the last two weeks before the ship sank, we needed to use the electric pump to pump her out. Is that true?

"A. There was no electric pump. All we have is a belt-driven pump and a hand pump to the bilge.

"Q. Now, you say that during the ten days before she sank, the water got up over the floor boards several times. Is that true?

"A. No, that's not right.

"Q. Now, after describing the plugs that the divers put in, you then said that these plugs helped the leak and it was not as bad as before. Is that true?

"A. No, sir. I don't remember that, either.

"Q. Henry, after the people down there had questioned you and you signed this paper, what happened to you after that?

"A. I got sick.

"Q. Did your illness have anything to do with this questioning?"

Mr. Batchelor:

I will withdraw my objection. He can answer.

"The Witness:

"I don't know.

"(By Mr. Dow):

"Q. Can you remember now what you told these people?

"A. No, sir, I don't quite remember.

"Q. How long did this questioning last? Have you any idea of the time?

"A. About fifteen or twenty minutes.

"Q. Now, are you certain that what you have told us here today is the truth?

"A. Yes, sir. I am sure of that. That's the truth.

"Q. You know you have taken an oath, Henry?

"A. Yes.

"Q. And you have sworn before God that what you told us here today is the truth, is that right?

"A. Yes.

"Q. If this statement is in conflict, if you understand what I mean by conflict, with what you have said here today, do you think that's true?

"A. The statement?

"Q. Yes.

"A. The statement is not true.

"Q. Had you ever been brought to the Commissioner's office before?

"A. No, sir.

"Q. Is the Commissioner a friend of yours?

"A. I would not say he is an enemy, but at the same time, he is not my friend.

"Q. During the time when you were questioned, was he kind or helpful to you?

"A. I don't think he was of any help to me because he didn't help me any. He didn't say anything about me or anything like that.

"Q. Henry, had you, at that time, ever been off your little island before, except in fishing boats around there?

"A. No, sir.

"Q. You are here in Miami today. When was the first time you came to the United States?

"A. I don't quite remember. About two months ago.

"Q. You came here to do what?

"A. I came here on Mr. Willner's boat.

"Q. To work on the boats?

"A. Not to work, to do a little painting and stuff like that.

"Q. You are working for the people that own these boats today?

"A. Yes.

"Q. Are the boats you are working on the ones replacing the Sea Pak?"

Mr. Batchelor:

Objection: immaterial.

The Court:

What is the materiality?

Mr. Dow:
To the question before this Court, none whatsoever.

The Court:
Very well. Objection sustained.

Mr. Dow:
Some of the other questions follow that. I will have to go down until I can get away from this.

"Q. When the Sea Pak was under way with both her main engines going, what other machinery would be going, too?
"A. The battery charging generator, the refrigeration.
"Q. Did that make much noise?
"A. Quite a bit, yes, sir.
"Q. While you were under way, if you had hit a floating log, could you have heard it?
"A. No, sir. The refrigeration engine makes too much noise for you to have heard it. You wouldn't be able to hear anything if it hit the ship.
"Q. This vessel was packed pretty full with machinery?
"A. Yes, sir."

Mr. Dow:
So, unless this statement is offered in evidence there is nothing more to read here except my objection and my motion to have it suppressed. Do you offer it in evidence, Mr. Batchelor?

Mr. Batchelor:
We will, Mr. Dow, on our case.

Mr. Dow:
I beg your pardon?

Mr. Batchelor:
We will offer it in evidence on our case, at the proper time.

Mr. Dow:
Well, at that time I shall strenuously object. The plaintiff rests.

Plaintiff Rests.

Mr. Batchelor:
At this time the defendant moves for the dismissal of the cause on the ground that the plaintiff has failed by the evidence adduced to prove that the loss came within the terms of the policy.

The Court:
Gentlemen, it is almost four o'clock, about our recess time, anyway. Can you come back at nine o'clock in the morning?

Mr. Batchelor:
Yes, sir.

Mr. Dow:
Your Honor please, I hope that sometime between now and tomorrow morning, if Your Honor could find time to read my pretrial memorandum I think it might be helpful in understanding the plaintiff's position.

Mr. Batchelor:
We have a memorandum we would like to submit to the Court on the issues, too.

The Court:
We will have to make it at nine-thirty. We will meet again in the Courtroom here at nine-thirty in the morning, and finish the case tomorrow, I hope.

(An adjournment was then taken until tomorrow, Wednesday, September 28th, 1955, at 9:30 o'clock a.m.)

Morning Session.

Miami, Florida,
Wednesday, September 28, 1955,
9:30 o'clock a.m.

The Court:
Counsel, you may proceed. The motion made and undisposed of, is it to be submitted without argument, or do you want to be heard?

Mr. Batchelor:
We will leave it up to your Honor's discretion. If you care to hear argument I will be glad to argue it.

The Court:
I think the motion should be denied under the rule, and the Court will hear argument on the case.

Mr. Batchelor:
Reserve decision?

The Court:
Yes.

Defendant's Evidence.

Mr. Batchelor:
We should first like to read into evidence the testimony that was taken of Roy Jennings before the Honorable B. K. Monteith, Acting Judge of the Supreme Court of the Turks and Caicos Islands, under letters rogatory in South Caicos on the 1st day of August, 1955.

The Court:
Any objection to opening the deposition?

Mr. Dow:
Oh, no.

(The Clerk then opened said deposition.)

Mr. Dow:
I will read my part, Mr Batchelor, and you will read yours. (Reading):

"May it please the Court, I am Mr. Dow, representing the plaintiff. The Letters Rogatory were taken out by the defendant to examine one of the members of the crew of the vessel that went down.

"As I understand it, although those are the circumstances, I examine the witness first on behalf of the plaintiff; is that correct, sir?

"The Court:
"Yes; and counsel for defendant cross examines.

'Mr. Dow:

"Thank you, sir. Will you call Mr. Jennings.

"Thereupon—

"ROY JENNINGS of Cockburn Harbour in the Turks and Caicos Islands, being duly sworn, on his oath, saith as follows:—

"By Mr. Dow:

"Q. Will you state your full name, please?

"A. Ronald Nathaniel Jennings.

"Q. And where do you live?

"A. Cockburn Harbour.

'Q. And on or about the 13th of August, 1954, what was your business? What were you doing for a living?

"A. '54. I was out sailing, '54.

"Q. Were you employed on the vessel Sea Pak?

'A. Right, yeah

"Q. In what capacity?

"A. I was cook on her.

"Q. And that is your business? Is that what you have always done?

"A. Yes, sir, Cook.

"Q. Now, I will help you a little here. I think the ship left Cockburn Harbour about August 9 and you were out some three or four days before you came in; is that right?

"A. Right.

"Q. Will you tell the Court in your own words and as best you can what you were doing those days?

"A. Yes.

"Q. What the ship was doing and what your job was and what you were doing.

"A. Right. I was the cook on board while I was on the ship. For the four days we were down there.

"Q. What?

"A. I was the cook on board the ship, yes.

"Q. And the ship was fishing?

"A. Yes, she was.

"Q. And when was the first time that you knew that there was any danger or that the boat was leaking?

"A. I noticed that that morning I was 8 o'clock and I had some trouble and I gathered around 3 o'clock that morning I was still. And the captain I heard say, "We have to go in to port to bring the ship in to the harbor.'

"Q. And what duty did he ask you to perform, if any?

"A. To make some coffee.

"Q. And did you do anything else besides make the coffee?

"A. Yes. After I got through with the coffee I helped with the hand pump.

"Q. And where was the hand pump located?

"A. On the side. The platform back there.

"Q. And what time was that?

"A. That's around about 4 o'clock. That was on the way coming in.

"Q. And then you continued to do that until—as you proceeded the ship got under way then?

"A. Yes, hir.

"Q. Now, do you remember how she acted? You have any recollection of that?

"A. No, sir, I can't recollect that.

"Q. Were you eventually told to get off the ship and into a small boat?

"A. Yes.

"Q. How was the ship then, the Sea Pak?

"A. She had a port list on her, she was going down by a port list.

"Q. Was she high in the water or low in the water or—

"A. No, she was riding low and that's why we had to abandon ship, to save ourselves.

"Q. And what was the wind?

"A. Yes, sir.

"Q. Which way was the wind blowing?

"A. About southeast or something.

'Q. That would be taking you out of the harbor away from the land?

"A. Yes, sir.

"Q. Were there any waves at the time?

"A. Yes, a little wave, yes, sir, have a little wave.

"Q. And you got into the rowboat and you rowed ashore?

"A. Yes, sir.

'Q. Where did you land?

"A. Landed around Long Key on the back, inside.

"Q. And was the Sea Pak still afloat when you landed?

"A. She was almost gone then before we got in.

"Q. Now, tell me, Mr. Jennings, how old are you?

"A. Twenty-eight.

"Q. Twenty-eight?

"A. Yes, sir.

'Q. How long did you go to school?

"A. To school? I have been to school not so much long. I used to be in boats fishing and hauling after my mother died.

"Q. Did you go to school one year or two years?
"A. I think it was three years, sir. I used to be fishing and boat hauling.
"Q. And can you read or write?
"A. No, sir, I can't manage.

"Mr. Dow:
"Your witness."

Mr. Batchelor:
(Reading).

"Cross Examination.

"By Mr. Batchelor:
"Q. Mr. Jennings, do you remember the last trip that the Sea Pak went out collecting lobsters?
"A. Yes.
"Q. As I understand it, on the trip when she sank she was out collecting conchs, is that correct?
"A. That's right.
"Q. The trip before she sank, had she been out collecting lobsters?
"A. Yes.
"Q. Now, were you on board that ship the trip she made collecting lobsters, which was before the trip before she sank?
"A. No, sir, I used to be on board backward and forward.
"Q. In other words, you were on her part of the time and part of the time you were on the running boat?
"A. Yes, sir.
"Q. When the Sea Pak came in here her last lobster fishing trip, was she leaking any?

"A. I really can't remember whether she was.

"Q. Do you recall two divers going down to look at the bottom of the Sea Pak before this last trip that she went out on?

"A. Wasn't me that called the divers.

"Q. I think you misunderstood my question. Do you remember two divers coming out to look at the boat?

"A. I can't remember. The time that y'all called me up here, I was really a little intoxicated—"

Mr. Batchelor:

Then the Court said: (Reading.)

"The Court:

"But you do remember the divers coming down?

"The Witness:

"Divers always been fishing around this

"The Court:

"You know of them coming down to look at the boat?

"The Witness:

"No, sir."

Mr. Batchelor:

Examination by myself (Reading):

"Q. Did you ever go over and dive under the boat with some divers looking at the bottom of the boat?

"A. I don't remember. I can't remember that.

"Q. Do you ever recall going over the side of the boat with some divers when some divers put some plugs in the bottom of the boat?"

Mr. Dow (Reading):

"Objection; leading, no proper foundation."

Mr. Batchelor:

And the Judge, sitting at the deposition, said: "It is in cross examination. You are entitled to lead if you want to." Do you want me to read all of that colloquoy?

Mr. Dow:

Yes.

Mr. Batchelor (Reading):

"It depends on whether you wish to reframe the question."

Mr. Dow (Reading):

"Mr. Dow:

"Well, Your Honor, I suggest that in view of the witness that we have, that I dare say that he might be led to say most anything."

Mr. Batchelor (Reading):

"The Court:

"Yes. But as I understand it, isn't he your witness? He's only being cross-examined now to test his story. And the case of the other side is being put to him?"

Mr. Dow (Reading):

"Mr. Dow:

"Yes, Your Honor, I think that's correct. But I ask the Court to keep in mind that a witness of this

man's education or lack of it or his ability to absorb education be kept in mind. I think he might be led to admit almost anything."

Mr. Batchelor (Reading):

"The Court:

"Go ahead." Then I asked that the question be reread, and then he answered (Reading:

"A. No, sir, I can't remember.

"(By Mr. Batchelor:

"Q. Now, Mr. Jennings, when the Sea Pak left Cockburn Harbour on this last trip on about the 9th or 10th of August, can you tell us whether or not the boat was leaking any at that time?

"A. No, sir, no different from any other boat having troubles inside and something like that, no trouble that I know anything about at all.

"Q. At any time when you were on the Sea Pak as cook, did the water ever come up in the galley over the floorboards?

"A. No.

"Q. Now, when, on the morning of the 13th of August, when you took up anchor and headed back for Cockburn Harbour—You remember that?

"A. Yes, sir.

"Q. —was there any water in the galley at that time, on the floor of the galley?

"A. At the time on the floor of the galley while I was making coffee there, there was a leak spring and was began to come up. And gathering around.

"Q. Now, at the time you pulled up the anchor, Mr. Jennings, how deep was the water on the floor of the galley?

"A. I can't be able to tell you. It was nothing at all. I don't know how many feet of water was there.

"Q. Let me put it this way. Was there enough water so that when you stepped down into it that it came up on your foot or leg?

"A. I really don't know how much water it was there. I can't tell you.

"Q. Mr. Jennings, I wish to hand you this paper and ask you if that is your signature.

"A. I can write but I cannot read.

"Q. I am just asking you if that is your signature.

"A. That's right, I told you just now when I did make that I was intoxicated the time you called me. I didn't really know what I was doing.

"Q. It is your testimony now that at the time you signed this paper you were intoxicated?

"A. That's right.

"Q. Mr. Jennings, do you remember seeing me down here before?

"A. Yes, I did saw some fellow like you but I didn't really know it was you.

"Q. You recall seeing this gentleman sitting here, Mr. Hallbauer, with me?

"A. I saw him, yes.

"Q. Do you remember coming up to this very office with Astwood being present, and Mr. Hallbauer, and myself being here?

"A. I was very intoxicated at the time. I couldn't remember what I was doing.

"Q. Do you remember coming up to this room with Mr. Astwood being present and Mr. Hallbauer and myself being here?

"A. Yes, I did come up here, but I really didn't know what I was doing right when I came up here.

"Q. Do you remember making this statement at that time—

"A. I can't remember my statement.

"Q. Let me read it to you and see if it might refresh your recollection."

Mr. Dow (Reading):

"Mr. Dow:

"Objection. I suggest to the Court that a statement which he cannot get in by offering it as evidence is not something that he can get in by reading to the Court."

Mr. Batchelor (Reading):

"Mr. Batchelor:

"I am going to offer this statement into evidence at this time, and I am going to ask it be marked for identification and placed with the deposition."

Mr. Dow (Reading):

"Mr. Dow:

"I object to the offer. I have never seen it."

Mr. Batchelor (Reading):

"Mr. Batchelor:

"I am giving you an opportunity to read it."

Mr. Dow (Reading):

"Mr. Dow:

"And I object to its offer in evidence and ask the Court to rule on that at this time."

Mr. Batchelor (Reading):

"The Court:

"Yes. He has admitted the signature, hasn't he?

Mr. Batchelor: Yes. The Court: And if he has admitted the signature and it is some evidence that it is his document, that's all the evidence you want. He admits that he can't read or write. He says he was intoxicated at the time he did it. You can't want anything else."

Mr. Dow (Reading):

"Mr. Dow:

"I don't believe the proper foundation has been laid. If the man cannot read, cannot write, and says he was intoxicated at the time he signed—The Court: Yes. Mr. Dow:—I don't believe that the signature at the foot of it is indication that it's what he said at all. The Court: Not as to the contents, perhaps, of the statement; but as to the identity of the document which he signed. Mr. Dow: It identifies it, yes, sir. The Court: That's the value of it for the moment. Mr. Dow: It gives it no probative value."

Mr. Batchelor (Reading):

"I think that is a matter for the Court who tries this matter to weigh. Here is the document which the man admits he signed. He has testified he was not competent and he doesn't believe he was at the time; but that's a matter for the Court to weigh. We are going to have testimony to present at the trial of this case in Miami that he was competent at the time he signed it, and that's a matter for the judge in Miami to weigh. The Court: I think the document can be tendered at the moment for what purpose you want it. It depends on what purpose you intend to use it for."

Mr. Dow (Reading):

"Mr. Dow:
"Is it your purpose to impeach the testimony of this witness now here under oath with this document you have offered in evidence?"

Mr. Batchelor (Reading):

"Mr. Batchelor:
"It is my purpose to offer this document in evidence for the purpose of asking him if he made the statements that are contained over his signature. The Court: Yes."

Mr. Dow (Reading):

"Mr. Dow:
"I still object to it, Your Honor. I do not believe that a statement that is not sworn to—there is no evidence as to the manner in which it was executed—and no evidence that the man knows what's down there; and I would like to ask the witness if there was anyone present at the time who represented him, either an employer, a lawyer, or did he have any friend present at that time. The Court: You have your right of re-examining. The instrument will be marked as Exhibit 1. Mr. Dow: I would like to ask the Court if it would mind reading that document first before it's put to any further use by counsel for the insurance company."

Mr. Batchelor:
The Court then read the document and we resumed the questioning. (Reading):

"(By Mr. Batchelor):

"Q. Mr. Jennings, do you recall this document being read to you in the presence of Mr. Astwood before you signed your name to it?

"A. I can't remember.

"Q. On that day on which I have mentioned and on which Mr. Hallbauer, Mr. Astwood, and myself, were present when you came up, do you recall stating that on the last lobster trip in July the boat was leaking and 'when we got back into port two divers who were working for the company came out to where we were anchored and went overboard to examine the bottom'; you recall stating that?

"A. I can't remember that.

"Q. Do you recall stating at that time: 'We were then anchored in about a fathom and a half of water. The divers found three holes on the port side forward near the keel. I put on the face mask and went down to help the divers by handing them tools which they needed'; do you recall telling us that?

"A. I can't remember that.

"Q. Do you recall this—stating this: 'They had Mr. Berlinsky make three plugs about four inches long and about three inches in diameter. I carried these plugs down to them and saw the holes into which the plugs were placed'; do you remember stating that?

"A. No, sir, I don't.

"Q. Do you remember stating this: 'After the plugs were put in, the vessel did not leak quite as bad as before, although we still had to pump it by hand occasionally in addition to using the electric pump': do you recall saying that?

"A. I can't remember that.

"Q. Mr. Jennings, do you recall stating this on that occasion: 'When we left on the 10th of August

the boat was leaking badly and we had to pump very often'; you recall stating that, sir?

"A. I can't remember.

"Q. You recall on that occasion stating to us this: 'On several occasions the water in the galley got up as much as a foot above the floorboards'; you recall stating that?

"A. I can't remember.

"Q. You recall stating this at that time: 'At the time we pulled up the anchor the water in the galley was almost up to my knees'; do you remember that?

"A. No, sir; I can't remember that, sir.

"Mr. Batchelor:

"That's all."

Mr. Batchelor:

At this time we would like to offer the statement into evidence as a defendant's exhibit.

Mr. Dow:

Just a moment. I have some examination.

Mr. Batchelor:

I know, Mr. Dow, but at this time I would like to offer the document into evidence and then read your examination.

Mr. Dow:

I certainly do object on all the ground I have heretofore stated.

The Court:

You rely on the grounds stated to the Commissioner or the Judge who took the deposition?

Mr. Dow:

I do, sir. This man was alone, not represented, ignorant, illiterate, hadn't the faintest idea of why he was called when he was brought there; he had no friend present. I submit that under those circumstances and considering the sort of man he was that he could be made to say or sign anything.

The Court:

The deposition was taken by whom?

Mr. Batchelor:

It was taken before the Acting Judge of the Supreme Court of the Turks and Caicos Islands, under Letters Rogatory, issued through the State Department to the appropriate Judicial Authority of the Turks and Caicos Islands.

The Court:

He ruled, and I think properly, that it was admissible. The weight to be attached to it is for me.

Mr. Batchelor:

That is for Your Honor to determine.

The Court:

The objection will be overruled and the document received in evidence.

(The Statement of Roy Jennings, dated October 16, 1954, was thereupon received in evidence and marked "Defendant's Exhibit No. 3.")

Mr. Dow:

This is re-direct examination by myself (Reading):

"Q. The only job you ever had on this ship was cook, is that true?

"A. Right, yes, sir.

"Q. It says here, 'On May 10, 1954, the Sea Pak left Harbour on a trip and I stayed aboard her for about ten days.' Now, this statement is dated the 16th of October, 1954. Did you remember the exact date you left to go out on that ship six months after you left?

"A. No, sir, I can't remember that.

"Q. What day is it today, do you know?

"A. Today is supposed to be the—"

Mr. Batchelor:

We withdraw our objection.

"(By Mr. Dow):

"Q. Do you know what day it is today?

"A. I think today would be the 21st or something like that—22nd or something like that.

"Q. Are you sure?

"A. I am not certain, I'm just thinking.

"Q. It says that you came into town on the 24th of May and went back on board on the 25th of May. Did you have any discharge books or records—

"A. No, sir.

"Q. —with you at the time to recall these dates?

"A. No, sir, I had nothing like that.

"Q. When you were called to come up here and answer questions put to you by these two gentlemen sitting opposite me at the table, where were you that day?

"A. I was down across at Clarisa Brooks place down in there.

"Q. What were you doing there?

"A. I always go down there. She's my auntie. She lives down there.

"Q. Had you been told these people were coming to see you?

"A. No.

"Q. Nobody gave you any notice beforehand?

"A. No, sir, not notice beforehand.

"Q. When you were brought before them, did you have anybody with you?

'A. Yes—no, I came alone. Malcolm come and called me and I came alone.

"Q. Now, was there anybody from the Tropical Marine Products with you at the time?

"A. No, one.

"Q. Did you meet anybody here from that company?

"A. No, sir.

"Q. Did you have a lawyer of any kind present?

"A. No, sir.

"Q. Did you have any papers or documents with you to refresh your recollection on dates?

"A. No, sir.

"Q. Do you have any papers or documents of any kind that have all these dates on them?

"A. No, sir, have not.

"Q. They don't give you regular discharges and records from this ship showing each day that you worked or didn't work and where the ship was at that time?

"A. No, sir.

"Q. So you had no way of finding out what these dates were?

"A. No, sir, I really did not.

"Q. Now, you told us before that you had been drinking on that day?

"A. Yes, sir. I was intoxicated, that's right.

"Q. Where did you get the liquor?

"A. Bought it at the barroom.

"Q. You had no notice of any sort that you would be called upon to make some statements with respect to a ship you had been on several months before?

"A. No, sir, I had no notice at all.

"Q. Now, it says, 'We came into port the latter part of July and stayed until August 10 when we went down and anchored on the lee side of Long Key.' Do you recall where you were on August 10?

"A. No, sir, I can't remember that.

"Q. Did these people show you any papers showing the movements of this ship during the six months previous?

"A. No, sir.

"Q. How many feet is a fathom and a half?

"A. I really don't know exactly.

"Q. Now, it says here, 'We were anchored in about 12 feet of water and about 500 yards from shore.' Do you recall the depth of water any time you were anchored?

"A. No, sir.

"Q. Did you have anything to do with anchoring the ship?

"A. Nothing, I had nothing at all to do with that.

"Q. Were you ever called upon to measure the depth of the water?

"A. No.

"Mr. Dow:

I should like the Court to always keep in mind that this document is dated the 16th of October and concerns events which this witness is supposed to have recalled from October '53 up until August of '54.

"(By Mr. Dow):

"Q. Now, it says here, Mr. Jennings, 'That on the night before you came in on that last trip that there was a southeast wind blowing.'

"A. Right.

"Q. Do you remember the direction of the wind on a given night two months before?

"A. No, sir, I can't remember. No.

"Q. When you are out in a boat, do you know southeast from northeast?

"A. Yes, I know south from north. And east from southeast.

"Q. Can you box the compass? Do you know the directions?

"A. No, I can't.

"Q. Now, it says here; 'They had Mr. Berlinsky make three plugs about four inches long and about three inches in diameter.' Well, now, that is a hole as big as your arm. Did you see anything like that?

"A. No, sir.

"Q. Did you ever see any holes in that ship at any time in your life?

"A. No, sir.

"Q. Did you ever go down under the ship and look at her bottom?

"A. No, sir.

"Q. You were only the cook and that is the only duties you ever had; is that correct?

"A. Yes, sir, that's all I have to do.

"Q. Now, it says here: 'On the afternoon of the 12th we finished work about 4:30 and I cooked supper and went to bed about 8 o'clock. About 2 the next morning the captain called me and said we were going into port because of the leak.' Now, Mr. Jennings, could you remember exact times of anything?

Do you think you could, to the half hour, two months after it happened?

"A. No, sir, I really can't remember.

"Q. When these people questioned you at the time this statement was taken, did they ask you these dates and times and directions?

"A. I can't remember if they asked me dates and times. I didn't check on the dates at all.

"Q. Did they show you any papers or log books or records or anything?

"A. No, sir, never saw any.

"Mr. Dow:

"I would like to call the attention of the Court to of intelligence and compare it with the professional job in this statement that's been offered in evidence. And for the benefit of the Court in Miami that will hear the case, I think that the Court would greatly appreciate the opinion of this Court as to this witness as to demeanor and his obvious—I submit—inability to give the information here in such great detail, as to exact dates and hours many months before. Otherwise, the Court in Miami will be utterly without any assistance in evaluating this testimony.

"The Court:

"Yes.

"(By Mr. Dow):

"Q. Now, did they read this paper to you? Did they read anything to you afterwards?

"A. I can't remember.

"Q. And you can't remember yourself?

"A. No, sir.

"Q. But you can sign your name, you can do that?
"A. Yes, I can sign my name.

"Mr. Dow:
"That's all."

Mr. Dow:
Mr. Batchelor had one more question.

Mr. Batchelor (Reading):
"Q. Mr. Jennings, what time of day did you begin drinking that day that you came up here to see—
"A. I was drinking from that evening, the next day morning, all day, and then y'all sent for me.
"Q. Pardon?
"A. I was drinking from the evening before.
"Q. And you had been drinking all night?
"A. All night.
"Q. And hadn't been to bed?
"A. That's right.
"Q. And still drinking the next morning?
"A. Yes. And I got the call up there.

"Mr. Batchelor:
"That's all."

Mr. Dow:
This is the first time I have seen this.

Mr. Batchelor:
The only other statement in there is the one made by the Court with respect to Mr. Dow's request that he make a statement about the demeanor of the witness.

Mr. Dow:
I would like to read this, if you don't mind.

Mr. Batchelor:
All right.

Mr. Dow (Reading):

"The Court:
"Any more?

"Mr. Batchelor:
"Nothing further.

"Mr. Dow:
"Is Your Honor going to make any comments on the record for the benefit of the Miami Court?

"The Court:
"So far as it goes to something of the demeanor of the witness or the type of witness we have been dealing with will appear from the evidence as admitted to writing. But I would be overstepping the bounds or function if I were to give my own personal opinion of the demeanor of the witness. Naturally, I will have formed one, but I have no notion of saying anything about the opinion I have formed. I think it would be trespassing into the sphere of the Miami Court to give an opinion of the demeanor of the witness. They have only requested the taking of the deposition. The judge is an experienced judge and he will know exactly what appears from it."

Mr. Btachelor:
I would like to call Mr. Fred Hallbauer.

FRED H. HALLBAUER was thereupon called as a witness on behalf of the Defendant, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. Batchelor):

Q. Will you please state your name?

A. Fred H. Hallbauer.

Q. What is your address?

A. 714 Pacific Building, Miami, Florida.

Q. What is your occupation, sir?

A. Marine Surveyor.

Q Will you tell us some of the institutions or companies you represent in this area?

A. I represent the American Bureau of Shipping, Lloyd's Registry of Shipping, Norwegian Veritas, Lloyd's Classification Society, U. S. Salvage Association, Salvage Association of London, Board of Underwriters of New York, National Cargo Bureau; I am Lloyd's Agent.

Q. How long have you been a marine surveyor?

A. Over ten years; a good deal over ten years.

Q. Did you make a trip to South Caicos Island on or about October 16th, of 1954?

A. Yes.

Q. Did you go there in company with myself?

A. Yes.

Q. While you were in South Caicos on that day did you talk with a man named Henry Mills?

A. Yes.

Q. Can you tell us who Henry Mills was, what his relationship was to the Sea Pak?

A. Henry Mills was engineer on the Sea Pak

Q. Where did you talk with Henry Mills?
A. In the Commissioner's office.
Q. Was I present?
A. Yes.
Q. Was the Commissioner, Mr. Astwood, present?
A. Yes.
Q. Mr. Hallbauer, at that time did you ask Henry Mills why he sank the Sea Pak?
A. No.
Q. Do you recall anyone asking such a question of Henry Mills?
A. I didn't hear any such question as that.
Q. Mr. Hallbauer, while you were there did you also talk with Roy Jennings?
A. Yes.
Q. Was he a member of the crew of the Sea Pak, too?
A. He said he was, yes.
Q. Where did you talk with Roy Jennings?
A. In the Commissioner's office.
Q. Was I present?
A. Yes, sir.
Q. Was Mr. Astwood, the Commissioner, present?
A. Yes.
Q. How long was Jennings in the Commissioner's office with us that morning?
A. Oh, I would guess probably three-quarters of an hour to an hour.
Q. Do you recall where you were sitting while he was in the room?
A. Yes.
Q. Where were you sitting?
A. On the righthand side of the Commissioner's desk.
Q. Do you recall where I was sitting?

A. You were sitting on the lefthand side.

Q. Do you recall where Jennings sat?

A. He sat outside of the rail opposite you on the lefthand side of the desk.

Q. How far would you say he was from me?

A. Oh, possibly four foot or five foot.

Q. How far do you think he was from you during this conversation?

A. Oh, diagonally across the desk he would probably be, perhaps, eight or nine feet.

Q. Did you notice Henry Mills as he came into the room that morning?

A. I did.

Q. Excuse me. Jennings; did you notice Jennings as he came into the room that morning?

A. Yes I saw him as he came in.

Q. Were you present during this whole three-quarters of an hour you talked about, when he was questioned?

A. I was there all the time he was there, yes.

Q. Did Roy Jennings give you any impression of being intoxicated at that time?

Mr. Dow:

Objection. That calls for the conclusion of the witness.

The Court:

Is drunkenness one of the things a witness may express an opinion about under the rules of evidence in Florida?

Mr. Batchelor:

I understand it is if he has an opportunity to observe him.

The Court:

It seems to me like the Supreme Court has held that. Have they or not?

Mr. Batchelor:

It is my understanding they have.

Mr. Dow:

It just happens a short time ago I had that up with the Federal Court in New York, and the Judge took a slightly different view. He only permitted me to inquire as to the manner of speech and objective things that the witness could see about the person who was said to be intoxicated.

The Court:

I may be in error, but it seems to me that the Supreme Court of Florida has held that is admissible evidence, the opinion of a layman with reference to whether a person is drunk or not. If it is true the Supreme Court has held that, then your question is proper.

Mr. Batchelor:

In order to obviate the possibility of any error, will withdraw my question and reframe it.

The Court:

Very well.

(By Mr. Batchelor):

Q. Will you tell us the appearance that Roy Jennings gave you as he came into the room that morning and walked over and took his chair?

A. Well, I think that the way he acted and talked and walked, climbing the stairs—

Q. This office was on the second floor?

A. The second floor. I would say that his actions were of a perfectly normal man.

Q. How was his speech?

A. Well, as clear as to be expected.

Q. What do you mean by that?

A. Well, the natives of those various islands, those various places, have their own way of talking. They pronounce words a great deal differently than we do.

Q. Have you been to the Caicos Islands on more than one occasion?

A. I have.

Q. Was the speech which Roy Jennings used that morning in any way different from the normal way of speech of the natives of those islands you have seen?

A. No. That is what I say, his speech was normal for natives of those islands; not only that island, but all other islands, other places, down through there.

Q. What was your impression of the coherence or the sense of the statements which Jennings made that morning in answer to the questions?

Mr. Dow:

Objection. That is a conclusion for the Court to make.

Mr Batchelor:

I think the witness can certainly say whether the man made coherent statements or whether these statements were erratic.

The Court:

There, again, you are having the demeanor of the witness related by the observer on the issue of whether he was intoxicated or not.

Mr. Batchelor:
That is what this all bears on.

The Court:
That is what you have in mind, to show whether he was intoxicated?

Mr. Batchelor:
Yes, sir.

The Court:
As bearing upon his claim that he was, which, in turn, bears upon the weight of the statement, as the Justice there rightly commented.

Mr. Dow:
That was not the question, I understood, that was asked. Perhaps, I am mistaken.

The Court:
I think probably the witness might strive to state the actions of the witness there on the issue of whether his behavior might indicate that he was intoxicated or the reverse.

Mr. Batchelor:
I will withdraw the question.
Q. Describe the manner in which Roy Jennings answered the questions on that occasion.

Mr. Dow:
Objection.

The Court:
Overruled.

A. As far as I could see, he answered the questions very freely and very clearly, as clear as you would expect with the difference in the pronunciation of words, and so forth. I would say that he answered and talked in a very normal, clear manner.

(By Mr. Batchelor):

Q. While Roy Jennings was present in the room for this three-quarters of an hour, as you have described, did you detect any smell of alcoholic liquor in the room at all?

A. No.

Q. Mr. Hallbauer, were you present when Roy Jennings signed a statement on that date?

A. Yes, sir.

Q. Did you see him sign the statement?

A. I saw him sign it.

Q. Was Mr. Astwood, the Commissioner, present at that time?

A. Yes, he was.

Q. Did you see Mr. Astwood witness the statement?

A. He signed it as a witness, as Justice of the Peace.

Q. Was the statement read to Jennings before he signed it?

A. As I remember it, Mr. Astwood read the statement to him and then he signed it and then Mr. Astwood signed it.

Mr. Dow:

Objection. I move to have the answer stricken. The witness either remembers it or he does not remember it. It is not clear from his answer he knows either.

The Court:
Objection overruled.

Mr. Batchelor:
That is all.

Cross Examination.

(By Mr. Dow):

Q. The place where you examined these witnesses that day back in October of 1954, that is a Courtroom, isn't it?

A. I presume it is used as a Courtroom on occasions, and the Commissioner uses it as his office on other occasions.

Q. Well, it was used as a Courtroom last week when you were there?

A. It was used as a Courtroom last week, yes.

Q. And there is a desk taking the place of a bench and a railing across? In a smaller sense, it is pretty much the layout of this room, isn't it; much smaller, of course?

A. Oh, I would say yes, on the same general principle.

Q. And the Commissioner sat in the center chair behind the bench, and you and Mr. Batchelor sat on either side of him; isn't that correct?

A. That is correct.

Q. And the witness sat in front of the rail?

A. No. The witness was in front of the rail, right up close to the rail, and the rail is right close to the desk, and it is up one step; the desk is up one step from the floor.

Q. Yes.

A. The desk is pushed right solid against the rail.

Q. There is a raised diaz on which there is a desk, behind which you three gentlemen sat, then there is a dropped floor for the witnesses and lawyers and things of that sort; isn't that correct?

A. A drop of one step.

Q. Yes; that is correct.

A. Yes.

Q. Mr. Hallbauer, can you smell my breath from here?

A. No. You are a little farther away than he was that morning.

Q. Not much.

A. A whole lot farther away than he was that morning.

Q. That was the whole tableau under which these people were examined; is that correct?

A. I don't quite know what you mean by that.

Q. That was the setting?

A. That was the setting, yes.

Q. Now, did you know before you went down there that these plaintiffs had offered to fly you, and whomsoever the underwriters wanted to go down there, to the islands? Did you know that?

Mr. Batchelor:

We object. That is immaterial.

Mr. Dow:

I think I shall show the materiality of it. You can move to strike it if you want to when I am through.

Mr. Batchelor:

I renew my objection. I don't see any materiality at all.

The Court:

He might, if he wishes to make a proffer there, let the Court determine whether the testimony would be material to any issue here. You propose to examine this witness as to whether an offer was made to take him for the examination of this witness, not the witness but the deposition witness Jennings?

Mr. Dow:

No, sir. What I propose to show by the question I was about to ask was that Mr. Hallbauer and the others connected with the underwriters had an offer before them by the owners to fly them down, meet everybody and be given a full disclosure, that this they declined to accept, but without notice, without telling a soul about it, they swooped down on the place, gathered up these simple little native people, brought them in to a setting like I have just described and examined them in the manner in which they did. Heaven knows what they could elicit. That is the conclusion which I hope the Court will draw.

The Court:

Well, if that is material I think you may show it by other witnesses. Was there any obligation on the part of the insurance company to accept that offer?

Mr. Dow:

None whatsoever except as a matter of good faith between the assured and the insurance company, which is exhibited in marine insurance companies.

The Court:

Very well. You may show it in rebuttal if you wish.

Mr. Dow:

Your Honor may recall Mr. Willner's testimony that he did make such an offer to the insurance company in New York when he went up there to see them and they declined to accept it. I simply wanted that reaffirmed by this witness. Therefore, I shall withdraw it.

Q. Mr. Hallbauer, when you went down to the islands in October of last year who went with you?

A. Well, there was quite a group that went down in the plane, but most of them went along for the ride.

Q. You mean it was sort of a holiday junket in addition to business?

A. If you want to call it that.

Q. What sort of a plane did you take?

A. A DC3.

Q. Where did you get it?

Mr. Batchelor:

This is all immaterial. We object to it. How he got there and who went with him, unless they had something to do with this case, is immaterial.

The Court:

I think its materiality is limited. If you can confine it to the testimony of this witness, whether he went for the ride or whether he went in good faith to help obtain testimony, it has only a slight bearing on the weight of his testimony.

Mr. Batchelor:

How we got the plane certainly is immaterial.

The Court:
What is that?

Mr. Batchelor:
Who the plane was gotten from or who the plane was chartered from has no materiality. That is the question.

The Court:
Oh, no; none at all. Objection sustained.

Mr. Dow:
May I ask him if they chartered it from Pan American?

Mr. Batchelor:
The same objection.

The Court:
The same ruling.

(By Mr. Dow):
Q. Instead of taking the people along that you did, Mr. Hallbauer, might you have taken one or two representatives of the assured if you felt like it?

Mr. Batchelor:
Objection. That is immaterial.

The Court:
Wouldn't that depend, Counsel, on whether he had control of the mission or not? Wouldn't that question be material, if at all—

Mr. Batchelor:

Even if we assume he could have taken somebody from the assured, there is no obligation on him to take them. I don't see it is admissible.

The Court:

Wouldn't that inquiry, if material, be better directed to the parties, to the insurance company, and not this witness? Objection sustained.

(By Mr. Dow):

Q. Did you notify the assured or their representatives that you were going down there?

Mr. Batchelor:

The same objection.

(By Mr. Dow):

Q. You yourself.

Mr. Batchelor:

The same objection. It is immaterial whether he notified them or not. It has no bearing whatsoever on the case.

Mr. Dow:

I think it has.

The Court:

I am not sure I know the purpose of your inquiry. Is it whether he volunteered to go as a witness or whether he was requested by the defendant here to go?

Mr. Batchlor:

No, sir. As I understand it, the question is whether he told one of the assureds he was going down there.

Mr. Dow:

In other words, did he tell the employers of the people he was going down to see that he was going down to see them, or did they sneak down there. That is the point.

Mr. Batchelor:

If I ever heard of testifying by counsel, that is it.

The Court:

The inquiry doesn't appear to be material. Objection sustained.

(By Mr. Dow):

Q. When you were called in this case, Mr. Hallbauer, were you aware of the name of the surveyor, the company's surveyor, at the time the vessel went in the risk?

Mr. Batchelor:

The same objection; entirely immaterial, whether he was aware of the name of the surveyor who examined it a year before or not.

(By Mr. Dow):

Q. May I ask you, in your search—I presume you made a search for information on this vessel—did you consult your fellow-surveyor who checked her out in the first place?

Mr. Batchelor:
The same objection.

The Court:
The same ruling.

(By Mr. Dow):
Q. Had you ever seen this vessel before?
A. Yes.
Q. You had been aboard her?
A. Yes. I think I can say I have been aboard her.
Q. Where was she at the time?
A. She was lying at Port Everglades.
Q. Do you remember the month that was?
A. No.
Q. Do you remember the day of the month that was?
A. No.
Q. What hour of the day was it?
A. I don't know.
Q. Do you remember what year it was?
A. It was before these people purchased it. The previous owner had it at that time.
Q. Were they repairing it at that time, rebuilding it?
A. No. They were living aboard it. There was another vessel close to it they were taking care of that had caught fire and burned. I went up there to find out what I could about it. I think a rain shower came along while I was up there and I went aboard this vessel to get out of the rain.
Q. Did Mr. Barba own it at that time?
A. He did not own it at that time.
Q. That was before he owned it?
A. That is right. I said the previous owner, before these people had bought it.

Q. You have lived in the south and amongst natives quite a few years, haven't you?

A. Yes.

Q. Are you familiar with those people somewhat?

A. Yes.

Q. Don't you find them people who are always eager to please?

A. Not necessarily, no.

Q. They are colored men, are they not?

A. That is right.

Q. Do you find them strong, courageous and freedom minded?

A. It all depends on conditions.

Q. What was your purpose in going to Caicos the first time?

A. To assist in obtaining statements as to the sinking; to investigate the sinking; to see what we could find out about it.

Q. You were searching for information?

A. That is right.

Q. Anything you could find about the ship; right?

A. Anything we could find about the vessel that would help to determine the cause of her sinking.

Q. Wouldn't her construction, knowledge of her construction and of the manner in which she was put together be helpful on that point?

A. Yes, it probably would, but when you consider a vessel as old as that one was—she had probably been rebuilt two or three times, so her original construction would not have too much to do with it.

Q. Do you know that this vessel had ever been rebuilt before? Are you testifying to that?

A. I said when you get a vessel as old as that, it has probably been rebuilt two or three times.

Mr. Dow:
I object to the answer as not responsive and ask it be stricken.

The Court:
Motion denied.

(By Mr. Dow):
Q. Don't you seek as much information about a ship, either recent past history or even further past history, when you investigate a thing of that sort?
A. Investigate a loss?
Q. Yes.
A. You assemble as much information as possible, yes; certainly.
Q. Her construction and re-construction all has something to do with it, doesn't it?
A. Yes.
Q. Now, I repeat my question. Did you discuss this vessel with the surveyor who was in charge of her most recent rebuilding?

Mr. Batchelor:
I renew my objection; the same grounds as before.

The Court:
What is the purpose of that, Counsel?

Mr. Dow:
Your Honor, I question very much whether this surveyor was engaged to find out all he could about the ship and make a thorough investigation of the loss. I suggest to this Court that his job was to avoid the payment of the loss and that is all he was con-

cerned with. A man who wanted to find out everything would have gone to the people who knew it and not to the cook to find out the seaworthiness of the ship, that the owner or master might have been concerned with, and force words down the cook's throat.

Mr. Batchelor:
I think we are getting into argument now.

The Court:
Objection sustained.

The Witness:
I would like to add something in here if I may. I have been associated with you on the investigation of a couple of cases. I think you know pretty well how I work.

(By Mr. Dow):
Q. This is not, as you know, a personal attack upon you. I have a client here I believe has been wronged, and it is up to me to do my very best for him. That is all I am trying to do.

The Court:
Proceed with the case here.

Mr. Dow:
That is all; no further questions.

The Court:
Mr. Witness, I would like to ask you a few questions.
Q. When you went to—Where was it?
A. Caicos Island.

Q. —to investigate the cause of the sinking of this ship, how did you contact this witness Jennings, the deposition witnes Jennings, who made the statement as you have testified?

A. You mean when we first went down there, the first time?

Q. The first time you contacted him. I assume you did so for the purpose of having him state to you his version if the sinking or what he saw or what he knew. Is that right or wrong?

A. Yes, sir, that is correct. We went down there to get as much information as we could from the crew members.

Q. Including Jennings?

A. Yes, sir. When we landed we went immediately to the Commissioner's office.

Q. Is that routine procedure?

A. Yes, sir, because that is the center of the island. That is the headquarters of everything that goes on on that island, the Commissioner's office. I had been to that island before on another case and knew the Commissioner, so I told him what we wanted, and he said he would try to have the men located and brought up before us to talk to.

Q. And he did?

A. Yes, sir.

Q. Without any assistance further on your part?

A. That is right.

Q. Then, how were the witnesses called, in what order, or, would you call them witnesses?

A. Well, not exactly witnesses in that case. They were crew members we wanted to get a statement from.

Q. This inquiry or hearing that was conducted there, is that routine procedure in a case of this kind?

A. Yes, sir. After a vessel has sunk for no good reason a surveyor locates the crew members, as many as he thinks of the crew members are necessary to find out what happened; in other words, it is up to a surveyor to get as much information as he can.

Q. Are these hearings usually conducted in the presence of the Commissioner?

A. No, sir. In the United States here we would probably ask a crew member to come into the office or into some other office, somewhere where a statement could be taken and his statement notarized. It could be done in the company's office, the shipyard office, the surveyor's office or any place like that.

Q. Is that standard procedure?

A. Yes, sir.

Q. In maritime losses?

A. Yes, sir; it is here, as far as I know. I have been doing it for a long time.

Q. Is that procedure generally known to a seaman, such as Jennings was?

A. Well, I would doubt if Jennings had ever made a statement before; I don't know.

Q. Or knew of the practice?

A. Or knew of it, no, sir.

Q. So, he appeared there in response to a summons or request by the Commissioner?

A. Yes, sir.

Q. What time of day was this hearing had?

A. I would guess we were talking to Jennings shortly after nine. We left here quite early in the morning, got in there, and it was a little while before he came in.

Q. Was that your first contact with him, there in the Commissioner's office?

A. Yes, sir.

Q. When he appeared who notified him or stated to him the object of his summons or why he was present, why he had been called?

A. Mr. Astwood told him.

Q. Who is Mr. Astwood?

A. Mr. Astwood is the Commissioner. He told him we were down there investigating the loss of the Sea Pak and we would like to ask him some questions. He asked him if he was willing to answer questions and he said he was.

Q. Was he then examined?

A. Well, Mr. Batchelor and I both asked questions.

Q. Were there any other witnesses there, any other crew members?

A. Not at that time. Henry Mills came in later

Q. You don't know whether Mills and Jennings had been contacted immediately before the hearing? You don't know whether they had been or not?

A. No, sir, I don't.

Q. Then, did the seamen or crew members—Did Jennings make his statement in a forthright manner or was he hesitant, or just how did he?

A. He answered the questions and volunteered information as we went along very freely, and without any attempt to conceal anything.

The Court:

I think that is all I have to examine this witness about. Any further examination by either counsel?

Mr. Batchelor:

No further questions.

(By Mr. Dow):

Q. I am curious to know why the policeman that brought Mills to the Commissioner was the same policeman that brought Jennings in.

A. Well, I don't know. I wouldn't—I don't know.

Mr. Dow:

That is all.

The Court:

You are excused.

(Witness excused.)

Mr. Batchelor:

I would like to call Mr. James Stuart. Mr. Stuart appeared yesterday. I don't believe it will be necessary to swear him in again.

The Court:

He has already been sworn. He is under oath.

JAMES P. STUART was thereupon recalled as a witness on behalf of the Defendant, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. Batchelor):

Q. In your opinion and based upon your experience in the maritime field, how often should a wooden hull vessel, such as the Sea Pak, one that operates in the waters around the Caicos Islands, be hauled out of the water for an inspection of her bottom?

Mr. Dow:

Objection. What the requirements are upon the assured are set forth in the policy. If it is suggested that this is required under the policy, that is one thing. Much is required. If this is required, I withdraw my objection.

Mr. Batchelor:

There is no requirement under the policy that she be hauled. We put Mr. Stuart on the stand, an expert witness, who is admittedly so, to testify about matters which will bear on the condition of this boat at the time she went down.

Mr. Dow:

Mr. Stuart is the most capable witness in the world to testify as to the condition of this vessel when she left Miami, but I do not propose to go into the realm of speculation as to what might have been done or should have been done or should not have been done unless it is something which the assured under the policy was required to do and failed to do; otherwise, we could never stop; we could go on forever.

Mr. Batchelor:

We are not in the realm of speculation. We are in the realm of what happens to boats when they are not properly taken care of.

Mr. Dow:

Mr. Stuart can testify to anything he knows about the ship itself or any requirements he placed on her with respect to drydocking or that appear in the policy.

The Court:
Read the question.

(The pending question was thereupon read by the reporter.)

The Court:
I think that is not so important and is probably outside of the issues. The question might be, in the absence of regular or periodic inspections what would likely, in the opinion of this witness, if he knows, happen to the hull of the vessel, bearing upon whether, of course, the leak that did occur in this ship was because of deteriorated or bad material in the hull or whether it was caused by coming in contact with some object, or otherwise.

Mr. Batchelor:
We will withdraw our question and reframe it along that line, being more specific.
Q. Mr. Stuart, based upon your experience, do you feel that the bottom of a vessel, such as the Sea Pak, could be adequately inspected while she was lying afloat by two divers going underneath the water and each spending half an hour apiece examining her bottom?

Mr. Dow:
The same objection.

Mr. Batchelor:
Now we are on a specific issue, Your Honor. That is what they testified they did.

Mr. Dow:

That is not the issue. The issue is whether the vessel was lost under this policy or not.

Mr. Batchelor:

They put the diver on to testify from his inspection what he thought her condition was there.

The Court:

Objection overruled.

(By Mr. Batchelor):

Q. Do you understand the question?

A. I would like for you to repeat it.

Mr. Dow:

Read the question.

The Court:

The question is whether an adequate inspection could be made by divers while the ship is in the water?

The Witness:

In my opinion, no, sir.

(By Mr. Batchelor):

Q. Tell us why not.

A. You can't make a proper inspection of the planking and of the butts or the seams.

Q. You can't make a proper inspection of the planking or her butts and seams. What conditions can occur to those members?

A. Well, your butts—your caulking in your butts can shrink up and your planking can also start getting soft, and you can't locate it under water.

Q. What effect does the tropical waters have upon the bottom of a ship when the paint has been scraped with a brush?

Mr. Dow:

Objection. There is no testimony in here that the paint was scraped with a brush.

Mr. Batchelor:

I will amend it and put in there "when the bottom is scraped with a brush".

Q. What happens to the bottom of a ship in these tropical waters when her bottom has been scraped with a brush?

A. It takes the paint off.

Mr. Dow:

What is the answer?

The Witness:

It takes the paint off.

(By Mr. Batchelor):

Q. What happens to the bottom of a ship when her paint has been taken off?

A. You have got an opportunity for worms to get into the—

Mr. Dow:

I can't hear you.

The Witness:

There is a good opportunity for worms to get into the planking.

(By Mr. Batchelor):

Q. What would worms do when they get into the planking in the ship's bottom in these waters?

Mr. Dow:

Objection. There is no testimony here that there were any worms in the ship's planking at any time.

Mr. Batchelor:

There is testimony there was no paint on the bottom of the ship.

Mr. Dow:

That is correct. That is as far as it goes. There is testimony by one witness there was very little. I believe another witness said he thought there was some.

(By Mr. Batchelor):

Q. What happens to the bottom of a ship when the paint is taken off?

A. It will give an opportunity for worms to get in to the planking.

Q. What do worms do when they get into the planking of a ship?

A. They will eat the planking on the inside.

Q. What effect does that have on the bottom of the vessel?

A. It weakens the strength of the vessel; it weakens your planking.

Q. Is it possible for a vessel, such as the Sea Pak to spring leaks because of worm action?

A. Yes, sir. If your planks are eaten badly up around your butts, there is a very good opportunity to put a strain on your planking.

Q. Will you explain what happens?

A. If the inside of the planking gets porous around your fastenings and your ship is working you will work your planking loose, because the nails will not be holding the planking properly. That is how you sometimes spring butts that way.

Q. That action will take place in the ordinary operation of the vessel, or is it dependent upon her running into some unusual seas or weather?

A. No, sir. It is a result you get with ordinary seas.

Q. Based upon your experience, how long does it take worms to infest the bottom of a ship to the extent this condition you have described can exist?

Mr. Dow:

May I have the question read back.

(The pending question was thereupon read by the reporter.)

A. Three or four months.

Mr. Batchelor:

That is all.

Cross Examination.

(By Mr. Dow):

Q. If you had her hauled out on a marine railway how would you examine the caulking in the butts? What method would you use if it were you, or how would you expect others to do it?

A. By the use of a knife, the blade of a knife.

Q. Or by screwdrivers?

A. No, sir; the blade of a knife.

Q. You would poke in it?

A. You go into the caulking.

Q. That is the way you think it should be done?

A. Yes.

Q. All you need to do is to see it clearly for that purpose?

A. You see it and then check it with the blade of a knife as far as you can go in there, because your outside layers of caulking may be soft. You may have an inside layer which is hard.

Q. Did you ever see a surveyor use a screwdriver or some tool for that?

A. I have never seen one of them do it.

Q. Is there any virtue in putting your knife in out of water? In other words, if you put your knife or instrument in the seams under water does that make any difference, whether it is under water or out of water?

A. You don't have so much chance to get underneath the water and inspect your boat, to work your knife in from one end to another.

Q. I mean, if you reached down while the ship was afloat and did it just below the waterline, say a few inches or a foot, with your arm.

A. Just a few inches underneath the waterline, you could do that.

Q. So, the mere fact there is water on the seam at the time has nothing to do with the manner in which you test it at all: is that right?

A. Up at the edge of the water, but not down underneath the bottom.

Q. What is the difference?

A. Because you can't get your knife properly in and work it into your corners.

Q. Why can't you?

A. I wouldn't be able to do it.

Q. No, I know you wouldn't, but do you think—

A. You see, when you get planks, two planks coming together like that (illustrating), with a butt, to properly check that butt you have got to get down ino your corners of the planks underneath. If that is not properly caulked on these corners your water will work toward your butt and into the side. You have got to get into all four corners to make a proper test.

Q. Do you think if you were likewise an experienced diver, with a diving rig on, in those bright tropical waters, you might do that just as well as you could if you had your head above water?

A. No, sir, I don't think you could.

Q. You think the diving rig would in some way interfere with you?

A. No. If your caulking is at all soft under water, which it has a tendency to be, you would be pulling your caulking out. You could not test it properly to see whether that caulking was really set up properly. Do you know what I mean?

Q. I can't say that I do. You think there is some virtue in doing it in air rather than water?

A. Yes, sir.

Q. Haven't you often seen, and haven't you yourself tested caulking below the waterline by just putting your hand down in the water?

A. No, sir; maybe a couple of butts right on the waterline, but not down underneath.

Q. No, no; just below the water.

A. Just a butt on the waterline?

Q. That is right.

A. Yes, sir.

Q. You have done that?

A. Yes, sir.

Q. You feel you checked it properly?

A. I would say that is a proper test on that.

Q. Did you require any drydocking in your recommendations and, if so, was it later incorporated into the policy?

A. No, sir. The only time—

Q. Just "Yes" or "No". Did you or didn't you?

Mr. Batchelor:

Let the witness explain what the situation is.

Mr. Dow:

He either did it or not. That is all there is to this.

The Court:

Would he know whether it was incorporated in the policy or not?

Mr. Dow:

He can say whether he put it in his recommendations or not. I will stop there.

The Witness:

No, sir. I didn't put it in my survey.

(By Mr. Dow):

Q. Now, when a vessel springs a butt, and let's say it is a plank that runs aft from the point where it is sprung, and she is lying still in the water, and the vessel gets under way, will you tell the Court the manner in which it acts, whether the water comes in at the same rate as it did before, or does it increase?

Just explain to the Court what occurs in a situation like that.

A. If you spring a butt and it is an after plank on the boat you won't have so much leak when you are lying still. You could have a fair leak when you get under way. You are driving water into it; water is being forced into your butt. Unless that butt is absolutely set up tight it will force the butt down and cause a bigger leak.

Q. That leak continues even though the vessel subsequently stops?

A. Yes, sir. Once you force your plank down she is not going to mend.

Q. It is your opinion, I gather, if a vessel is not painted regularly in the Caicos Islands that the worms get into her?

A. Yes, sir.

Q. They will get in in three or four months?

A. Yes, sir.

Q. Have you ever been to the Caicos Islands?

A. No, sir.

Q. Would it surprise you to know there are not any worms in the Caicos Islands?

A. There are worms around the coast, all around in these warm waters.

Q. Around Florida that is true.

A. And offshore, too.

Q. That is also true, but in the Caicos Islands—

Mr. Batchelor:

I must object to inserting these statements. Counsel is testifying.

Mr. Dow:

I am going to put on a witness to that effect in re buttal. There are no worms in the Caicos Islands. That is all.

Questions By The Court:

Q. You say when a butt is sprung?

A. Yes, sir.

Q. Will you explain to me how that occurs? You mean where the end of a plank joins the end of the other plank?

A. Where two planks come together like that (illustrating).

Q. And forms a square?

A. Yes, forms a square. If the fastenings should let go and the caulking is soft around this butt, your caulking comes loose in that butt, you would have a force of water coming into that butt, which is about that wide open (indicating), your water will force that butt down.

Q. You showed about a quarter of an inch.

A. About a quarter of an inch; sometimes more than that. They will open up to three-eighths of an inch. With the boat going ahead you are forcing your water into the planks and into that hole.

Q. What would cause a butt to spring?

A. A poor fastening.

Q. What?

A. A poor fastening, or the wood is soft around the fastening.

Q. A fastening?

A. When she is heading into a sea or going ahead, she is always in motion; she is always working. Now, if your planking get soft around your fastenings then

your planking will work like this (illustrating), and get loose around your fastenings, just like a piece of rotten board. You take a piece of rotten board, you nail it up and you can work it back and forth. If she gets to working going ahead in the water, the water will force the planking off and force the butts open and cause a bigger leak.

The Court:

I understand.

Re-Direct Examination.

(By Mr. Batchelor):

Q. How long would it take one man to make a proper inspection of the bottom of the Sea Pak when she was hauled up on the marine railway out of the water?

Mr. Dow:

Objection. There is no testimony it was done or that it had to be done. This is sheer speculation involving something which was never required or performed.

The Court:

Isn't that a hypothetical question based on an assumption not in the record?

Mr. Batchelor:

No, sir. It is based upon the testimony of the divers. I won't go into it because Mr. Stuart was excluded. It is based upon the testimony of the divers as to how long it took them to examine the bottom under the water. I am asking this witness as to how

long it would take to make a proper inspection of that boat, even if she was out of the water, the purpose being to show whether or not the divers were able to make a proper inspection in the time they spent.

The Court:
An underwater inspection. You are asking him about a drydock inspection?

Mr. Batchelor:
Yes, sir.

The Court:
I suppose that is what you call it.

Mr. Batchelor:
Yes, sir.

The Court:
How long it would take. None was made in this case.

Mr. Batchelor:
No, sir.

The Court:
Or attempted to be made.

Mr. Batchelor:
No, sir.

The Court:
So, how will that help us in deciding what caused the leak?

Mr. Batchelor:

If it took X number of minutes or X number of hours to make an inspection at the time the vessel was hauled out of the water I think it is certainly a logical conclusion it would take at least that long, if not longer, to make the same inspection when it is floating in the water.

The Court:

Maybe this witness has knowledge of how long it would take when it is in the water.

Mr. Batchelor:

I will reframe it that way.

Q. Can you make an adequate inspection when she is afloat?

Mr. Dow:

Objection.

The Witness:

No, sir. I wouldn't do it.

Mr. Dow:

This witness has already testified he never did such a thing and couldn't do it.

The Court:

This same witness testified on that already.

Mr. Batchelor:

That is all. No further questions.

Re-Cross Examination.

(By Mr. Dow):

Q. You have testified, as I recall it, and correct me if I am wrong, that it is your opinion that the lack of paint caused worms to get in, and the worms caused the butts to spring, and, therefore, the ship went down; is that correct? Is that what you are testifying to?

A. That was the cause of the ship going down?

Q. Yes.

A. I don't know what caused the ship to go down.

Q. You haven't the faintest idea, have you?

A. Well—

Q. "Yes" or "No".

A. I have my own opinion.

Mr. Dow:

If Your Honor please, when the captain of the vessel wanted to express his opinion as to why the ship went down—he was on her deck at the time and in charge of her—was not permitted to.

The Court:

He says he can give it, but he has not undertaken to give it.

Mr. Dow:

I beg your pardon?

The Court:

This witness has not undertaken to give his opinion. He says he has one. You haven't asked him for his opinion.

Mr. Dow:
No, sir.

Q. The purport of your previous testimony, Mr. Stuart, then, is not to be construed as an opinion of what happened; is that correct?

A. No. I said what could happen.

Q. Right. Some other things could happen, too, couldn't they? There could be other things that sank the ship?

A. Yes, sir. A lot of things can sink a boat.

Q. Many things?

A. Yes, sir.

Q. Man does not know all the things that have sunk all ships, does he?

A. No, sir.

Q. A blow could do it?

A. Yes, sir.

Q. She might have strained a butt in the seaway at some previous date, which showed up later?

A. That could happen.

Q. Do you know whether or not any of those things did happen?

A. No, sir, I don't.

Mr. Dow:
That is all.

(Witness excused.)

Mr. Batchelor:
At this time we would like to read in evidence Interrogatory No. 2 served upon the plaintiff by the defendant in this cause. Interrogatory No. 2 reads as follows:—

Mr. Dow:

Excuse me. May I find mine and follow you I was not prepared for this. These are our interrogatories addressed to you?

Mr. Batchelor:

No; mine addressed to you.

Mr. Dow:

Just a moment. Now read the interrogatory and the answer.

Mr. Batchelor (Reading):

"State the latent defects in the machinery that caused the 'Sea Pak' to flounder." Answer: "None".

Mr. Dow:

May I at this time call the attention of the Court to the question itself, latent defects in the machinery. We never claimed there was anything wrong with the machinery. There may well have been a latent defect in the hull.

Mr. Batchelor:

But that was not pleaded in the complaint. They say it sank because of the perils of the sea, "latent defects in the machinery, and/or other perils insured against."

Mr. Dow:

And the other perils insured against are latent defects in the hull.

The Court:

The testimony so far in this case has made no point of any defect in the machinery, so in any event the case could not be determined against the defendant on that theory.

Mr. Batchelor:

We just wanted to eliminate that part from the complaint.

The Court:

The proof eliminates it.

Mr. Batchelor:

We would now like to offer into evidence a certificate of the United States Weather Bureau of the wind velocity and directions at their station at Turks Island on August 13, 1954.

Mr. Dow:

Is this the weather report of the station ashore or a station out off the coast?

Mr. Batchelor:

This is the weather report for the United States Weather Bureau station which they maintain at Turks Island.

Mr. Dow:

Is that station located on a ship off the coast?

Mr. Batchelor:

It is on shore.

Mr. Dow:
On land?

Mr. Batchelor:
On land.

Mr. Dow:
I object to it. We are not interested in the weather on land.

Mr. Batchelor:
If Your Honor could see the size of those islands, there isn't any difference.

Mr. Dow:
I think there is considerable difference.

The Court:
Objection overruled.

(The report of United States Weather Bureau showing wind direction and Velocity at Turks Island on August 13, 1954, was thereupon received in evidence and marked "Defendant's Exhibit No. 4.")

Mr. Batchelor:
At this time we would like to offer—

Mr. Dow:
Excuse me. I have just been advised by my client here that that weather station is twenty miles away from the harbor or area or vicinity of the plant, or where the vessel sank.

Mr. Batchelor:

That is a factor that can be taken into consideration by the Court in determining the weight to be given to it.

Mr. Dow:

And also that it is a mid-day reading and not in the morning when the wind comes up, as these people have testified today.

Mr. Batchelor:

I would like to say this to Mr. Dow: It is a reading every three hours from 1:30 a.m. to 10:30 a.m.

The Court:

It doesn't have a great deal of relevancy here, except its bearing on the testimony of one witness here as to the direction of that wind at that time. What is the import of the testimony?

Mr. Batchelor:

It shows that at 1:30 a.m. there was a 13 mile an hour wind; 4:30 a.m. 11 miles an hour; 7:30 a.m. 12 miles an hour; 10:30 a.m. 16 miles an hour.

The Court:

What has that to do with the sinking of this boat?

Mr. Batchelor:

We want to put it in to have some official evidence as to what the weather conditions were at that time.

The Court:

The wind and weather conditions. Objection overruled. Let it come in.

Mr. Batchelor:

I would like to offer in evidence the affidavit of Leonard Olaf Berlinski, which has been previously identified as Defendant's Exhibit No. 1 for Identification.

Mr. Willner:

We object to that. If Your Honor please, on the 20th of May we filed with this Court a motion requesting the production of all statements of plaintiff's crew members and/or employees, concerning the loss of the Motor Vessel Sea Pak, taken by defendant or defendant's attorneys in the Caicos and Turks Islands, British West Indies, or in Miami, Florida, and Mr. Batchelor came before this Court and said this was the work product of the attorney, yet. when it is offered in evidence it shows on its face it was taken by a marine surveyor, Mr. Milton L. Jones, and he would not produce it in this Court. It was not a privileged matter, and I submit to this Court he cannot now offer it in evidence.

Mr. Batchelor:

We didn't claim it was the work product of the attorney. Judge Holland denied their motion to produce the statement on the ground they had to come in and show that they could not get any statement from this witness; otherwise, he would require the production. That is the general rule. If you can go out and get a statement from a witness the Court is not going

to compel the other party, who has got a statement, to disclose what they have. That is the theory on which it was denied, not that it is a work product at all.

The Court:

The rules of evidence is not governed by the application of the discovery process.

Mr. Batchelor:

No, sir.

Mr. Willner:

If Your Honor please, we came in here and argued the motion, and when I said it was not a work product of the attorney Mr. Batchelor stood up and strenuously argued to the Court it was a work product. I submit that it is not admissible.

The Court:

The answer to that is that the rules of discovery have no force, necessarily, in the admissibility of evidence; in other words, it is not determined by the rules of discovery. Objection overruled.

(The affidavit of Leonard Olaf Berlinski, taken on August 16, 1954, was thereupon received in evidence and marked "Defendant's Exhibit No. 1.")

Mr. Batchelor:

We would now like to offer in evidence the statement of Henry Mills.

Mr. Dow:

I have stated already my objections to that statement the same as I have to the statement of Jennings.

The Court:

Objection overruled.

(The Statement of Henry Mills, dated October 16, 1954, was thereupon received in evidence and marked "Defendant's Exhibit No. 2.")

Mr. Batchelor:

The defendant rests.

Defendant Rests.

Plaintiff's Rebuttal:

LEONARD O. BERLINSKI was thereupon recalled as a witness on behalf of the Plaintiff, in rebuttal, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. Dow):

Q. You are under oath; you know that?

A. Yes, sir.

Q. Are you familiar with the conditions of marine life in Caicos, where you operated this vessel for something over a year?

A. Quite well, yes, sir.

Q. We have testimony here—

Mr. Batchelor:

We object to any statement to this witness as to what some other witness has testified to. That obviates the purpose of exclusion under the rule.

The Court:

Yes; that is true.

Mr. Dow:

Strike it out.

Q. Have you ever, Captain Berlinski, noted the presence of any worms that eat into the hull of a ship in Caicos?

A. No, sir, not in that particular area. We sometimes speak about that with the Commissioner, and the smaller boats which we have hauled from time to time have had no indication of worms.

Q. You have a marine railway that will haul smaller vessels; is that the idea?

A. Yes, sir.

Q. Did you ever come to any conclusion as to why that was peculiarly true in Caicos?

A. Well, in that particular area the only thing that I can think of would be the salinity of the sea water in that area, because it is one of the areas where they dehydrate salt from the sea water. It is very high in salinity.

Q. The Turks Island Salt Company operates a very large plant right near your plant; isn't tha true?

A. That is right.

Q. And operates another one on another island?

A. Yes.

Q. Is that because the water is peculiarly and particularly salty there?

A. Yes. It is not only that the water has a high salt content and also a magnesium content, but also the fact the climate is such that they can dehydrate it.

Q. You say that you have come to the conclusion that that affects the marine life there?

A. Yes. I wouldn't say that is the reason, not knowing too much about it. I would say that could be the reason.

Q. Did you scrape the bottom of that ship to take the seaweed and moss off of it in such a manner that it also removed the paint?

A. Not hardly, not with a soft brush; it wouldn't take the paint off.

Q. What was the condition of the ship under water, the hull, the last time you saw it?

A. I would say in good condition, as far as the hull is concerned.

Mr. Batchelor:

I am going to object to that and move to strike it, on the ground it is repetitious. That is what the witness has already testified to, and it is not in rebuttal.

Mr. Dow:

The answer was not quite responsive. I have asked about the paint that was on there.

Q. Can you remember what paint you had on the bottom?

A. We had a copper paint. The boat was sandblasted; the entire hull was sandblasted so the paint

would adhere to the hull, or any other parts under water.

Mr. Batchelor:

We renew our objection on the ground this is evidently in rebuttal of their own witness, who testified there was not any paint on the bottom.

Mr. Dow:

This witness has not testified as to the amount of paint. I am trying to get him to.

The Court:

He has covered that phase of it already. He said it was painted. Didn't you?

The Witness:

Yes, sir.

The Court:

Do you know how long it had been since it was painted?

The Witness:

Yes. When the boat was put in the water before it left Miami all the old paint was taken off.

The Court:

Do you know that of your own knowledge?

The Witness:

Oh, yes. The entire hull was sandblasted in order to be sure the old paint was off.

(By Mr. Dow):

Q. How many coats?

A. I don't quite remember. It was either two or three coats of paint went on the bottom of the hull, of the regular marine paint.

Mr. Dyer:

Their diver was put on the stand, and he testified there was not any paint on the bottom of the boat when he looked at it. This is not in rebuttal of any evidence we offered; it is in rebuttal of their own witness.

The Court:

Anything further of this witness?

Mr. Dow:

No, sir, that is all.

(Witness excused.)

Mr. Dow:

The plaintiff rests.

Plaintiff Rests in Rebuttal.

(Argument to the Court by counsel for respective parties.)

Mr. Batchelor:

Pursuant to the rules of this Court I would like to present proposed findings for consideration by the Court.

Mr. Dow:

It is not our custom up there to do a thing like that until the Court's opinion comes down, so I have not prepared any.

The Court:

I suggest, Counsel, you do prepare findings of fact. The Court will file in the case findings of fact and conclusions of law within ten days from this date, so if either party wishes to file any further memorandum with the Court you may do so within five days.

(Trial concluded.)

On March 19. 1956 DESIGNATION OF CONTENTS OF RECORD ON APPEAL was filed in the words and figures as follows:

Filed Mar. 19, 1956.

(Title Omitted.)

Plaintiff-Appellant, Tropical Marine Products, Inc., designates the following portion of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Summons and Complaint.

2. Answer.

3. Interrogatories propounded by defendant.

4. Answers to Interrogatories propounded by defendant.

5. Interrogatories propounded by plaintiff.

6. Defendant's objections to interrogatories propounded by plaintiff.

7. Answers to interrogatories propounded by plaintiff.

8. Motion for preference.

9. Denial of motion for preference.

10. Request for admissions.

11. Request to produce.

12. Notice of filing deposition.

13. Final judgment entered by Court.

14. Motion for a new trial.

15. Order denying motion for new trial.

16. Entry of judgment.

17. Order allowing an extension of time to appeal.

18. Notice of appeal.

19. Stipulation extending time to file record and docket appeal.

20. Cost bond.

21. Testimony and exhibits.

22. This designation.

ARTHUR L. WILLNER,
Attorney for the Plaintiffs.

I certify a copy of the foregoing was mailed to Smathers et al., attorney for the defendant, this 19 day of Mar. 1957.

United States of America,
Southern District of Florida. ss.

I, Julian A. Blake, Clerk of the United States District Court, in and for the Southern District of Florida, and as the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 274, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings, and evidence, in cause styled Tropical Marine Products, Inc. -versus- Birmingham Fire Insurance Company of Pennsylvania, number 6078-Miami-Civil, as appear upon the records and files of my office that have been designated by written directions of the appellant to be included in this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 28th day of March, A.D. 1956.

JULIAN A. BLAKE,
As Clerk of the United States District Court in and for the Southern District of Florida,
By EARLE F. SPRIGG,
Chief Deputy Clerk.

(Seal)

MOTION TO CORRECT OMISSION IN RECORD ON APPEAL.

Filed May 24, 1956.

United States Court of Appeals Fifth Circuit.

Tropical Marine Products, Inc., Appellant,
against No. 16071.
Birmingham Fire Insurance Company of Pennsylvania, Appellee.

Appellant, Tropical Marine Products, Inc., shows to the Court as follows:

1. On December 30, 1955, appellant filed a notice of appeal in the above entitled action, and on March 19, 1956, it served and filed a designation of record on appeal.

2. By error and accident the following material matters and documents were omitted from the said designation and record on appeal:

Notice of Motion and Motion (to Produce).

Order Sustaining Objection to Interrogatories.

Motion for Issuance of Letters Rogatory.

Order on Motion for Issuance of Letters Rogatory.

Letters Rogatory.

Objections to Request for Admissions.

Answers to Request for Admissions.

Order Sustaining Objections to Requests.

Proposed Findings of Fact and Conclusions of Law of Defendant.

Proposed Findings of Fact and Conclusions of Law of Plaintiff.

Said matters and documents were inadvertently omitted by counsel from appellant's designation because at the time of serving and filing its designation he did not have access to the complete file and pleadings in the above matter.

3. The record on appeal has not been printed at this time.

Wherefore, appellant respectfully makes an application to the Court for an order directing the Clerk to include in the record on appeal the complete record and all the proceedings and evidence in the action herein at the earliest time that these can be transmitted from the Clerk of the District Court.

ARTHUR LEE WILLNER, Esq.,
Attorney for Appellant,

Office and P. O. Address:
175 S. W. 17th Avenue,
Miami, Florida.

By ARTHUR L WILLNER.

Of Counsel:
WILBUR E. DOW, JR.

State of Florida,
County of Dade. ss.

Before me the undersigned authority personally appeared Arthur Lee Willner who being first duly sworn, deposes and says that he has read the foregoing Motion To Correct Omission In Record On Appeal and that the matters and facts contained therein are true and correct.

ARTHUR L. WILLNER.

Sworn to and subscribed before me this 23 day of May, 1956.

NORA TRAUGHBER,
Notary Public, State of Florida at large.

(Seal)

My commission expires Sept. 15, 1959. Bonded by American Surety Co. of N.Y.

I Hereby Certify that a copy of the foregoing Motion To Correct Omission In Record On Appeal was mailed to Smathers, Thompson & Dyer, Attorneys for Appellee, 1301 Alfred I. duPont Building, Miami, Florida, this 23rd day of May, 1956.

ARTHUR L. WILLNER.

ORDER GRANTING MOTION OF APPELLANT TO CORRECT OMISSION IN RECORD ON APPEAL.

Filed May 30, 1956.

In the United States Court of Appeals for the Fifth Circuit.

Tropical Marine Products, Inc., Appellant,

versus No. 16071.

Birmingham Fire Insurance Company of Pennsylvania, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

On Consideration of the motion filed by appellee to dismiss the appeal in the above entitled and numbered cause for failure of appellant to comply with Rule 75(d) Federal Rules of Civil Procedure, as adopted by Rule 10 of this Court, and of the motion filed by appellant to correct omission in the record on appeal, It Is Ordered that the motion to dismiss the appeal be Denied, and that the motion to correct omission in the record on appeal be Granted, and that the Clerk of the United States District Court for the Southern District of Florida, at Miami, prepare and forward to this Court a supplemental transcript of record containing all of the material matters and documents as designated in appellant's motion to correct the omission in record on appeal, which were inadvertently omitted by counsel from appellant's designation and record on appeal.

(Signed) J. C. HUTCHESON, JR.,
Chief Judge, U. S. Court of Appeals.

May 30, 1956.

(Original Filed—May 30, 1956.)

SUPPLEMENTAL TRANSCRIPT OF RECORD.

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,071

TROPICAL MARINE PRODUCTS, INC.,

Appellant,

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(SUPPLEMENTAL TRANSCRIPT OF RECORD RECEIVED JUNE 11, 1956).

On May 20, 1955 NOTICE OF MOTION AND MOTION (TO PRODUCE) was filed in the words and figures as follows:

In the District Court of the United States for the Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs. No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant.

To: Smathers, Thompson, Maxwell & Dyer, Attorneys for Defendant, Du Pont Building, Miami 32, Florida.

Please Take Notice that the undersigned will move this Court, in one of the Courtrooms of the United States District Court at the Federal Building in the City of Miami, Florida, on the 23rd day of May, 1955 at 3:00 o'clock in the afternoon, of that day or as soon thereafter as counsel can be heard, for an order requiring defendant to produce and permit Plaintiff to inspect and copy each of the following documents:

1. Report made to defendant by its marine surveyor, believed to be James Stewart, at the time the policy of insurance issued by defendant upon the M/V Sea Pak went into effect.

2. All statements of Plaintiff's crew members and/or employees, concerning the loss of the M/V Sea Pak, taken by defendant or defendant's attorneys in the Caicos and Turks Islands, British West Indies, or in Miami, Florida.

Defendant, Birmingham Fire Insurance Company of Pennsylvania, has the possession, custody, or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached, and made a part hereof.

(S.) ARTHUR L. WILLNER,
(Arthur Lee Willner),
Atty. for Plaintiff.

310 S. E. 2nd Avenue,
Miami 32, Florida.

I Hereby Certify that a copy of the foregoing was delivered to addressees this 20th day of May, 1955.

(S.) ARTHUR L. WILLNER,
Attorney for Plaintiff.

EXHIBIT A.

State of Florida,
County of Dade. ss.

Arthur Lee Willner, being duly sworn, deposes and says:

1. That he is the attorney for the plaintiff in the above entitled action, and makes this affidavit in support of an application herein for a discovery and inspection of certain statements and documents under the control of the defendant.

2. That this is an action brought for recovery on a contract of insurance entered into between the plain-

tiff and the defendant on the M/V Sea Pak, a fishing vessel, owned and operated by the plaintiff, which vessel became a total loss on or about August 13, 1954.

3. That due demand was made upon the defendant for payment under the aforementioned policy of insurance, but the defendant refused to pay for the loss under the policy and has since continually refused to pay without stating any reason therefore.

4. That he is informed and verily believes that prior to the commencement of the risk on the aforementioned policy, or soon thereafter, defendant caused a survey to be made of the Sea Pak by a marine surveyor, resulting in a report to the defendant on the material condition of the vessel at that time.

5. That he is further informed and believes that following the loss of the M/V Sea Pak the defendant through its attorneys or agents, obtained statements from all persons who were present at the time of the occurrence or who may have had knowledge of the facts leading up the occurrence.

6. That it is material and necessary and most important for the plaintiff to have access to the information contained in the said survey report or reports and in the said statements in order to establish the condition of the vessel at the commencement of the risk and the cause of the loss of the vessel to be proved at the trial of the action, as well as for the purpose of calling to the attention of any witness who

testifies, any variations from his original statement made soon after the happening of the accident.

7. Plaintiff has not yet been paid by the defendant for the loss suffered and is without means to properly replace the vessel for the work in which it was engaged.

(S.) ARTHUR L. WILLNER.

Sworn and subscribed to before me this 20th day of May, 1955.

(S.) MAE JOHNSON,
(Notary Seal) Notary Public, State of Florida at Large.

My commission expires: Nov. 13, 1957.

On June 15, 1955 ORDER SUSTAINING OBJECTION TO INTERROGATORIES was filed in the words and figures as follows:

In the District Court of the United States for the Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs. No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant.

This cause coming on to be heard upon the Defendant's Objections to certain Interrogatories propounded by the Plaintiff, and served upon the De-

fendant on May 20, 1955, and the Court having heard argument of counsel and being advised in the premises, it is

Ordered and Adjudged that the said Objections to Interrogatories 2, 13 and 14 be and the same are hereby sustained.

Dated at Miami, Florida, this 14th day of June, 1955.

EMETT C. CHOATE,
Judge.

On July 27, 1955 MOTION FOR ISSUANCE OF LETTERS ROGATORY was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant, by and through its undersigned Attorneys, and represents unto the Court that it verily believes that knowledge and information material to a just and proper determination of this case is in the possession of one Roy Jennings, a citizen of the British Empire and a resident of Cockburn Harbour, South Caicos Islands, Turks and Caicos Islands; that the said Roy Jennings was an employee of the Plaintiff at the time of the loss of the M/V "Sea Pak"; that the said Roy Jennings resides beyond the reach of the process of this Court and can not be compelled by the Defendant to testify in this cause by use of the usual processes.

Wherefore, the Defendant moves the Court for the Issuance of Letters Rogatory for the taking of the testimony of the said Roy Jennings upon oral examination.

SMATHERS, THOMPSON,
MAXWELL & DYER,
By (S.) DOUGLAS D. BATCHELOR,
Attorneys for Defendant.

I Hereby Certify that a copy of the foregoing Motion for Issuance of Letters Rogatory was mailed to Arthur L. Willner, Attorney for Plaintiff, 310 S.E. 2nd Avenue, Miami 32, Florida, this 26 day of July, 1955.

Of Counsel:
(S.) DOUGLAS D. BATCHELOR.

On August 2, 1955 ORDER ON MOTION FOR ISSUANCE OF LETTERS ROGATORY was filed in the words and figures as follows:

(Title Omitted.)

This Cause coming on to be heard upon the Motion of the Defendant for the Issuance of Letters Rogatory, and the Court having heard argument of counsel and being advised in the premises, it is, upon consideration

Ordered and Adjudged that Letters Rogatory for the taking of the testimony of Roy Jennings upon oral examination shall issue from this Court.

Done and Ordered at Miami, Florida, this 29th day of July, 1955.

EMETT C. CHOATE,
District Judge.

On August 2, 1955 LETTERS ROGATORY was filed in the words and figures as follows:

(Title Omitted.)

The President of the United States of America, to the appropriate Judicial Authority of the Turks and Caicos Islands.

Whereas a certain suit is pending in our District Court of the United States for the Southern District of Florida, in which Tropical Marine Products, Inc., is the Plaintiff, and Birmingham Fire Insurance Company of Pennsylvania, is the Defendant, and it has been suggested to us that justice can not be completely done between the said parties without the testimony of Roy Jennings whose residence is at Cockburn Harbour, South Caicos Islands, Turks and Caicos Islands, within your jurisdiction: We therefore request you that in furtherance of justice, you will, by the proper and usual process of your Court, cause the said Roy Jennings to appear before you, or some competent person by you for that purpose authorized, at a time and place by you to be determined, and there to make answer on his oath or solemn affirmation to the questions to be asked at such time and place of the said Roy Jennings by the Attorneys or

Agents for the parties to this cause, and that you will cause the deposition of the said Roy Jennings to be committed to writing and return to us under cover, duly closed and sealed and addressed to the Clerk of the United States District Court for the Southern District of Florida, Miami, Florida, United States of America. And we shall be ready and willing to do the same for you in a similar cause when required.

Witness, the Honorable Emett C. Choate, Judge of the District Court of the United States for the Southern District of Florida, the 1st day of August, 1955.

JULIAN A. BLAKE,
Clerk of Court,
By (S.) EARLE F. SPRIGG.
(Earle F. Sprigg),
(Court Seal) Deputy Clerk.

United States of America,
Southern District of Florida. ss.

I, Emett C. Choate, Judge of the District Court of the United States in and for a the Southern District of Florida, do hereby certify that Earl F. Sprigg, whose signature is attached to the Letters Rogatory hereto annexed, was at the date thereof, the Deputy Clerk of the District Court of the United States in and for the Southern District of Florida; that the official acts and doings of said deputy clerk are entitled to full faith and credit, and that the attestation to said Letters Rogatory is in due form of law.

I further certify that the seal attached to said Letters Rogatory is the seal of this Court.

Witness my hand and the seal of said Court at the City of Miami the 1st day of August in the year of our Lord one thousand nine hundred and fifty-five.

EMETT C. CHOATE,
(Emett C. Choate),
United States District
Judge.

United States of America,
Southern District of Florida. ss.

I, Julian A. Blake, Clerk by Earle F. Sprigg, Deputy Clerk, do hereby certify that Emett C. Choate, whose signature appears above, was at the date thereof, the Judge of the District Court of the United States in and for the Southern District of Florida; that the official acts and doings of said Judge are entitled to full faith and credit, and that the attestation to said Letters Rogatory is in due form of law.

Witness my hand and seal of said Court at the City of Miami the 1st day of August in the year of our Lord one thousand nine hundred and fifty-five.

JULIAN A. BLAKE,
Clerk of Court,
By (S.) EARLE F. SPRIGG,
(Earle F. Sprigg),
(Court Seal) Deputy Clerk.

On September 22, 1955 OBJECTIONS TO REQUEST FOR ADMISSION was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant, Birmingham Fire Insurance Company of Pennsylvania, by and through its undersigned Attorneys, and objects to certain Request for Admissions heretofore filed upon it on September 16, 1955, as follows:

Requests 4, 5, 6, 7 and 8, upon the grounds that the said Requests are irrelevant to any of the issues in this cause.

SMATHERS, THOMPSON & DYER,
By (S.) DOUGLAS D. BATCHELOR,
Attorneys for Defendant.

I Hereby Certify that a copy of the foregoing Objection to Request for Admissions was mailed to Arthur L. Willner, Esq., Attorney for Plaintiff, 310 S. E. 2nd Avenue, Miami, Florida, this 21 day of September, 1955.

Of Counsel:
(S.) DOUGLAS D. BATCHELOR.

On September 26, 1955 ANSWERS TO REQUEST FOR ADMISSION was filed in the words and figures as follows:

(Title Omitted.)

Comes now the Defendant pursuant to Rule 36, and answers the Request for Admissions heretofore served upon it by the Plaintiff, as follows:

1. Request. 1. Admitted.

2. Request. 2. It admits that a document entitled "Proof of Total Loss" was furnished it and admits that the said document was in the form of a photostatic copy attached to the Request but it does not admit the truth of the allegations contained in the said document.

3. Request. 3. It admits the genuiness of the survey report of August 10, 1953, by James B. Stuart, insofar as a copy of the said survey report is attached to the Request, but it alleges that the Plaintiff has omitted page 1 of the said survey report dated July 21, 1953, and it further denies that any of the said survey reports are material to any of the issues in this cause.

4. Request. 9. Denies.

AMERICAN INTERNATIONAL MARINE AGENCY OF NEW YORK, INC.,
Agents For
BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,
By (S.) H. W. MAGENHEIMER.

State of New York,
County of New York. ss.

Before me, the undersigned authority, personally appeared H. W. Magenheimer, who being first duly sworn, depos s and says: that the Answers to the above request for Admissions are true and correct to the best of his knowledge, information and belief, and that he signed this instrument in his capacity as Agent for Birmingham Fire Insurance Company of Pennsylvania.

.....

Sworn to and subscribed before me this 21 day of September, 1955.

(S.) THOMAS F. MOYER,
(Thomas F. Moyer),
Notary Public, State of New York.

No. 31-2801550, Qualified in New York County. Cert. filed with N.R. County Clerk. Commission Expires March 30, 1957.

I Hereby Certify that a copy of the foregoing Answers to Request for Admissions was delivered to Arthur L. Willner, Esq., Attorney for Plaintiff, 310 S. E. 2nd Avenue, Miami, Florida, this 26 day of September, 1955.

(S.) DOUGLAS D. BATCHELOR

On September 26, 1955 ORDER SUSTAINING OBJECTIONS TO REQUESTS was filed in the words and figures as follows:

(Title Omitted.)

This cause coming on to be heard upon the objections of the defendant to certain of the Request for Admissions filed upon it by the plaintiff, and the Court having heard argument of counsel and being advised in the premises, it is, upon consideration,

Ordered And Adjudged that the said objections be and they are hereby sustained.

Done And Ordered in Chambers at Miami, Florida, this 26th day of September, 1955.

GEORGE W. WHITEHURST,
United States District Judge.

RECITATION.

The following Proposed Findings of Fact and Conclusions of Law Submitted by the Plaintiff were never filed, but were found in the exhibits.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE PLAINTIFF.

(Title Omitted.)

Findings of Fact.

1. The defendant, Birmingham Fire Insurance Company of Pennsylvania, insured the refrigerated Motor Vessel Sea Pak under an American Institute

Time Hull Form of policy from noon, August 14, 1953 to noon, August 14, 1954. The insurance was originally issued in the name of T. A. Barba and on November 10, 1953, the name of the assured was changed to that of the plaintiff, Tropical Marine Products, Inc. The policy was in the principal sum of $30,000. During the period of time that the policy was in force, the vessel sank and was a total loss.

2. The Sea Pak was a wooden hulled vessel, originally built for the United States Coast Guard. She was 71 feet 7 inches long, 13 feet 6 inches wide and drew 6 feet of water fully loaded. In the spring and summer of 1953 she was re-built in Miami under the supervision of the representative of the original assured and a surveyor appointed for that purpose by the defendant. In early August of 1953 the vessel was completed and her refrigerating machinery installed. She was certified as seaworthy to the satisfaction of defendants surveyor and the risk attached at noon on August 14th, 1953.

3. Thereafter the vessel left Miami and proceeded to the Caicos Islands in the vicinity of which she was employed in the fishing business until the time of her loss.

4. She had not been drydocked subsequent to August, 1953 nor did the policy provide for drydocking during the period it was in force, although she had been placed in shallow water and her bottom scrubbed on several occasions while she remained afloat.

5. The Sea Pak left Cockbourn Harbor, South Caicos Island on August 9, 1954. She proceeded to an anchorage in the lee of Long Key, distant about 8 or 9 miles, fishing en route. The anchorage was protected from the prevailing winds, the anchorage remaining calm during the period of time the Sea Pak was anchored there in 15 feet of water.

6. At about noon on August 12th, the Master noticed that the Sea Pak's automatic bilge pump gave a larger squirt than usual. The same thing occurred later in the afternoon and toward evening it became progressively worse. The Master and Engineer continued to search for the source of the leak and toward evening it was determined to be coming from under the forward freezer box where it was impossible to reach it, either from within or without the ship. Because of the construction of the interior of the vessel, the bilge underneath this area was not accessible. Shortly before daylight on August 13th, the Master felt that the leak had developed to such an extent that he should return to Cockbourn Harbor.

7. As soon as it was daylight or about 5 P.M., the anchor was raised and the Sea Pak proceeded around the south end of Long Key into the open water of Turks Island Passage en route to return to Cockbourn Harbor. At this time the sea on the windward side of Long Key was choppy and there was a fresh breeze. These conditions were not unusual for that area and were not such as would ordinarily have caused the vessel any difficulty.

8. After the vessel got under way, the leak materially increased and the vessel began to pound.

About 6,000 pounds of conch were jettisoned in an effort to ease and lighten the ship but before she could reach the entrance to Cockbourn Harbor, the rising waters in the engine room drowned out the vessel's engines. The anchor was dropped with about 350 feet of chain but as the vessel was beyond the 100 fathom curve, it was to no avail. The prevailing wind and sea caused her to drift further out from the Harbor entrance and westward along Long Key. When the vessel was nearly awash and heavily listing to port, the Master determined that the safety of his crew demanded that they abandon ship, which he did in the dinghy that was habitually towed astern. The crew rowed east around the easterly end of Long Key and into the lee which it afforded where they landed ashore.

9. Shortly thereafter the Sea Pak sank and because of the depth of the water, no salvage attempt was made.

10. The precise cause and nature of the leak remained unknown.

11. Defendants have not shown that the vessel was unseaworthy immediately prior to her last voyage nor has there been any showing of want of due diligence on the part of the assured and owners of the Sea Pak to make her so.

Conclusions of Law.

1. This Court has jurisdiction of the parties and of the subject matter of this litigation, and venue is properly laid in the Miami Division of the Southern District of Florida.

2. As the vessel was shown to be seaworthy at the inception of the risk, a presumption has been raised that the loss was by perils of the sea and the assured need not offer positive proof of the cause of the loss. If Underwriters would rebut that presumption, they must not only prove that the vessel was unseaworthy but that the unseaworthiness "resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel."

3. Tropical Marine Products, Inc., is entitled to a decree against the Birmingham Fire Insurance Company of Pennsylvania for $30,000 with interest from August 13, 1954 together with proper costs, disbursements and attorneys fees, said attorneys fees to be agreed upon between the parties or brought before the Court for settlement.

Dated: Miami, Florida, October ...., 1955.

Respectfully submitted,

(S.) ARTHUR L. WILLNER,

(S.) ARTHUR L. WILLNER, ESQ.,
(Arthur Lee Willner),

Of Counsel:
WILBUR E. DOW, JR., ESQ.

RECITATION.

The Proposed Findings of Fact and Conclusions of Law of Defendant are not found in the file and were never filed.

On June 6, 1956 DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL was filed in the words and figures as follows:

(Caption Omitted.)

Plaintiff, Tropical Marine Products, Inc., on an order of the United States Circuit Court of Appeals for the Fifth Circuit, dated May 30, 1956, herewith files a Designation of Additional Contents of Record on Appeal to include the following documents which were inadvertently omitted from the previously filed Designation:

Notice of Motion and Motion (to Produce).

Order Sustaining Objection to Interrogatories.

Motion for Issuance of Letters Rogatory.

Order on Motion for Issuance of Letters Rogatory.

Letters Rogatory.

Objections to Request for Admission.

Answeres to Request for Admission.

Order sustaining Objections to Requests.

Proposed Findings of Fact and Conclusions of Law of Defendant.

Proposed Findings of Fact and Conclusions of Law of Plaintiff.

(S.) ARTHUR L. WILLNER,
(Arthur L. Willner),
Attorney for Plaintiff-
Appellant.

I hereby certify that a copy of the foregoing Designation of Additional Contents of Record on Appeal was mailed to Douglas D. Batchelor and Smathers, Thompson & Dyer, Attorneys for Defendant-Appellee, 1301 DuPont Bldg., Miami, Florida, this 6th day of June, 1956.

(S.) ARTHUR L. WILLNER,
(Arthur L. Willner).

United States of America,
Southern District of Florida. ss.

I, Julian A. Blake, Clerk of the United States District Court, in and for the Southern District of Florida, and as the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings, and evidence in cause styled Tropical Marine Products, Inc., -versus- Birmingham Fire In-

surance Company of Pennsylvania, number 6078-Miami-Civil, as appear upon the records and files of my office that have been designated by additional written directions of the appellant to be included in this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 8th day of June, A.D. 1956.

JULIAN A. BLAKE,
As Clerk of the United States
District Court in and for the
Southern District of Florida.
ida,
By EARLE F. SPRIGG,
(Seal) Chief Deputy Clerk.

SECOND SUPPLEMENTAL TRANSCRIPT OF RECORD.

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,071

TROPICAL MARINE PRODUCTS, INC.,

Appellant,

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(SECOND SUPPLEMENTAL RECORD REC. JUL. 2/56.)

ADDITIONAL DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL.

United States District Court, Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff-Appellant,
vs. No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant-Appellee.

Filed Jun. 28, 1956.

Plaintiff, Tropical Marine Products, Inc., on an order of the United States Circuit Court of Appeals for the Fifth Circuit, dated May 30, 1956, herewith files an Additional Designation of Additional Contents of Record on Appeal to include the following documents which were inadvertently omitted from the previously filed Designation and Designation of Additional Contents of Record on Appeal:

1. Substitution of Attorney.

2. Designation of Additional Contents of Record on Appeal.

3. This Designation.

ARTHUR L. WILLNER,
(Arthur L. Willner),
Attorney for Plaintiff-Appellant.

I hereby certify that a copy of the foregoing Additional Designation of Additional Contents of Record on Appeal was mailed to Douglas D. Batchelor and Smathers, Thompson & Dyer, Attorneys for Defendant-Appellee, 1301 DuPont Bldg., Miami, Florida, this 27th day of June, 1956.

ARTHUR L. WILLNER,
(Arthur L. Willner).

SUBSTITUTION OF COUNSEL.

In the District Court of the United States for the Southern District of Florida, Miami Division.

Tropical Marine Products, Inc., Plaintiff,
vs. No. 6078-M-Civil.
Birmingham Fire Insurance Company of Pennsylvania, Defendant.

That Fowler, White, Gillen, Yancey & Humkey, with the consent and approval of the Plaintiff, herewith and hereby withdraw as counsel and attorneys of record for the Plaintiff.

Arthur Lee Willner hereby and herewith enters appearance as attorney of record for the Plaintiff with the consent and approval of the Plaintiff.

FOWLER, WHITE, GILLEN,
YANCEY & HUMKEY,
By WALLER HUMKEY,
ARTHUR LEE WILLNER,
(Arthur Lee Willner),
Attorney at Law.

310 S. E. 2nd Avenue,
Miami 32, Florida.

I Hereby Certify that a copy of the foregoing Substitution of Counsel was delivered to Smathers, Thompson, Maxwell and Dyer, DuPont Building, Miami, Florida. by mailing the same this 26th day of April, 1955.

ARTHUR L. WILLNER.

Certified Copy.

United States of America,
Southern District of Florida. ss.

I, JULIAN A. BLAKE, Clerk of the United States District Court for the Southern District of Florida, do hereby certify that the annexed and foregoing is a true and full copy of the original 1. Substitution of Counsel filed April 26, 1955. 2. Additional Designation of additional contents of record on appeal filed June 28, 1956 Case No. 6078-MCivil. Re: Tropical Marine Products, Inc.—Plaintiff-Appellant vs. Birmingham Fire Insurance Company of Pennsylvania—Defendant-Appellee, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Miami, Florida this 28th day of June, A.D. 1956.

JULIAN A. BLAKE,
Clerk,
By PATRICIA L. GABEIL,
(Seal) Deputy Clerk.

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 570

BIRMINGHAM FIRE INSURANCE COMPANY
OF PENNSYLVANIA,
Petitioner,

vs.

TROPICAL MARINE PRODUCTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DOUGLAS D. BATCHELOR
DAVID W. DYER
1301 duPont Bldg.
Miami, Fla.
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

BIRMINGHAM FIRE INSURANCE COMPANY
OF PENNSYLVANIA,
Petitioner,

vs.

TROPICAL MARINE PRODUCTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Birmingham Fire Insurance Company of Pennsylvania, your Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 13, 1957.

OPINIONS BELOW

The opinion of the District Court is reported at 1956 A.M.C. 567 and is found on Page 47 of the record printed for the use of the Court of Appeals. The opinion of the Court of Appeals has not been reported as of the time of the preparation of this petition but is printed in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957 and a petition for rehearing was denied on September 11, 1957 (Appendix C). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. When a vessel sinks as the result of an unexplained leak which developed when she was at anchor in calm waters, is the assured in an action on a marine hull policy entitled to a presumption that the leak was the result of an insured peril?

2. May a Court of Appeals consider and decide a case upon issues which were not presented or tried before the District Court?

STATEMENT OF THE CASE

The following recitation of facts is a synopsis of the findings of fact made by the District Court (R. 47).

On August 14, 1953, the Petitioner, Birmingham Fire Insurance Company of Pennsylvania, issued its policy of marine hull insurance covering the M/V "SEA PAK" against

loss from "perils of the sea" and other stated risks, for a period of one year. "SEA PAK" was a wooden hulled vessel and was in good condition at the time of the issuance of the policy. She was then in Miami, Florida, but immediately thereafter she proceeded to Cockburn Harbour, Caicos Islands, B. W. I., where she was based for fishing operations. She was not again hauled out of the water during the year which elapsed between the issuance of the policy and the sinking of the vessel.

On August 9, 1954 the "SEA PAK" was navigated to an anchorage in the lee of Long Key, Caicos Islands, where she remained at anchor until the early morning of August 13th. This anchorage was protected from the prevailing winds and seas and the waters in the anchorage remained calm at all times while the "SEA PAK" was anchored.

At about noon on August 12th her Master noticed that the "SEA PAK" was beginning to take on an unusual amount of water. The leaking became progressively worse and it was determined that it was coming from underneath a refrigerated space in the forward part of the ship. The area of the leak was inaccessible from the interior of the vessel. Shortly before daylight on August 13th the leak had developed to such an extent that it was decided that an attempt should be made to return the vessel to her base at Cockburn Harbour, a distance of some eight miles.

After getting under way the leak continued to get progressively worse and the vessel sank before reaching port. Because of the depth of the water no salvage attempt was made. There was no explanation as to what caused the leak that resulted in the loss of the vessel.

The owners of the "SEA PAK" instituted an action based upon diversity of citizenship, in the United States District Court for the Southern District of Florida, seeking to recover the face amount of the policy of insurance. The case was tried before the District Court, sitting without a jury, and in due course the trial judge entered his findings of fact and conclusions of law (R. 47-51). It was the conclusion of the trial judge that when, as here, a vessel springs a leak in calm waters there is no presumption that her loss was caused by an insured peril. The Court also found that the assured had failed to prove that the vessel was seaworthy immediately prior to the development of the leak. The assured not having shown that the vessel sank as a result of an insured peril, judgment was accordingly entered for the Petitioner.

An appeal was taken by the assured and the judgment of the District Court was reversed by the United States Court of Appeals for the Fifth Circuit (Appendix A & B).

REASONS WHY CERTIORARI SHOULD BE GRANTED

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the decisions of other Courts of Appeal on an important question of marine insurance law.

QUESTION 1

When a vessel sinks as the result of an unexplained leak which developed when she was at anchor in calm waters, is the assured in an action on a marine hull policy entitled to a presumption that the leak was the result of an insured peril?

As set forth in the statement above the District Court found — indeed, it was conceded by both parties — that the cause of the leak was unknown. The District Court also found, and it was also conceded by both parties, that it developed while the vessel was lying at anchor in calm waters.

In a suit on a policy of marine insurance, the burden of proving that a loss comes within the terms of the policy rests upon the assured. **Continental Insurance Co. vs. Patton-Tully Transportation Co.,** 212 F. 2d 543, 5th Cir. The Petitioner recognizes, however, that under ordinary circumstances when a vessel **is lost at sea from unknown causes** the Courts permit her owner to indulge in a presumption that the vessel was seaworthy at the time of her loss and that she was lost because of an insured peril. **Paddock v. Franklin Fire Insurance Co.,** 17 Pick (Mass.) 227. However, when a vessel is lost as a result of **springing a leak in calm waters with no explanation,** her owner is not entitled to a presumption that she was lost as a result of an insured peril but, on the other hand, a counter-presumption arises that the sinking was the result of some unseaworthiness of the vessel. Under such circumstances, in order to prevail, the assured must at least show that the vessel was seaworthy immediately prior to the springing of the leak.

In the present case the trial judge of course found that the leak occurred in calm waters, that its cause was unexplained, and that the assured had not proved the seaworthiness of the vessel at the time of the sinking. It was the opinion of the trial judge that under such facts the assured could not prevail. In arriving at this conclusion the District Court followed the great weight of prior authority. In

Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441, the First Circuit, in considering this question, said:

> "It appears to be well settled in Great Britain and also in the United States, indeed the parties agree, that when a vessel sinks at a pier, in calm weather, without any obvious explanation, such as overloading or improper stowage of cargo, or collision, or settling with the tide on a rock or other underwater obstruction, lightning, fire, explosion of cargo or other casualty, **a presumption arises that the incursion of sea water which caused the sinking, and hence the loss, was due to the unseaworthiness of the vessel in some particular."** (Emphasis added.)

In **Klein vs. Globe & Rutgers Fire Ins. Co.,** 2 F. 2d 137, the Third Circuit, in a suit involving a policy of hull insurance, said:

> "The implied warranty of the libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river and the "perils of the seas" against which it was insured were such perils as would be extraordinary to a boat of its type.
> Our immediate duty is to determine whether the record shows that the Tornado's misfortune was occasioned by any such extraordinary peril. In this connection it is to be noted that, even though a vessel is shown to be seaworthy immediately prior to sinking, **no presumption exists that the water entered its hold as a result of a 'sea peril'."** (Emphasis added.)

In **Watson v. Providence Washington Ins. Co.,** 106 F. Supp. 214, E.D.N C., which opinion was approved by the Fourth Circuit, 201 F. 2d 736, the Court said:

> "Even if it be true that the Bertie Kay was seaworthy at the inception of the risk, the plaintiff cannot recover unless the sinking resulted from a peril insured against. If the cause was inherent weakness, or resulted from wear and tear or general unseaworthiness, the loss may not be attributed to a peril insured against. Appelman, Insurance Law and Practice, Vol. 4, Sec. 2689.
> In my opinion, according to the preponderance of authorities, **the insured ordinarily is not entitled to recovery under a marine insurance policy when the insured vessel sinks in calm water in fair weather without explanation."** (Emphasis added.)

These opinions from the First, Third and Fourth Circuits actually have their roots in several much earlier decisions. In 1831 the Supreme Judicial Court of Massachusetts in **Paddock v. Franklin Fire Insurance Co.,** supra, said:

> ". . . if the officers and crew are saved and return to give an account of the actual loss as it occurred, and if it appears from the proof there furnished and the circumstances attending, that the vessel was lost by springing a leak and foundering in moderate weather, **the presumption is that this arises from weakness and material defects; and the burden of proof is upon the plaintiff, to show that it arose from stress of weather, or from collision, or other external injury of an**

extraordinary character, coming under the denomination of perils of the sea." (Emphasis added.)

Again, in 1876, that Court, in **Swift v. Union Mutual Insurance Co.,** 122 Mass. 573, held:

> "If a ship is lost without any apparent sea damage or accident sufficient to destroy a sound vessel, **there is a presumption that it proceeds from inherent weaknesses or decay. For such loss the insuror is not responsible; and the burden of proof is on the plaintiff, as in other cases, to show that the loss arises from a peril insured against . . .**" (Emphasis added.)

Yet in the case at bar the Court of Appeals has ignored all of these prior authorities in granting to the ship owner a presumption that its vessel was lost because of an insured peril, even though she sank as the result of a leak which developed in calm water from unexplained causes. The Court has reached a conclusion which is in direct contradiction to those cited above. The opinions of the other Circuits and of the Massachusetts Court to the effect that such circumstances, in fact, raise a presumption of unseaworthiness has been disregarded without, we might add, a comment upon a single one of these decisions.

The Opinion of the Court of Appeals intimates that this case is somewhat different from those cited above in that the policy not only covers "perils of the sea" but also "latent defect" and "negligence of the Master".* The

* The "Inchmaree" clause to which the opinion of the Court of Appeals refers reads as follows:

"This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:—

inclusion in the policy of these coverages, which incidentally were also included in certain of the policies involved in the cases above, does not alter the principal issue presented, namely — What presumptions are raised by the springing of an unexplained leak in calm waters? If the presumption so raised is that the vessel sank as the result of unseaworthiness, as all of the above citations hold, the assured must present proof that his vessel was in fact seaworthy in order to be entitled to recover.

In arriving at a conclusion contrary to those above cited, the opinion of the Court below seized upon a presumption that the vessel was lost from a latent defect, or because of negligence of the Master, completely overlooking the possibility that such loss could well have been caused by deterioration in the hull. Indeed, the vessel's Master expressed just such an opinion (R. 159). There is certainly no more evidence tending to show a loss because of one of the insured perils than there is evidence to show a loss due to natural deterioration.

The plaintiff in **Watson v. Providence Washington Ins. Co.,** supra, made the same argument as has been advanced by the Court of Appeals in the opinion below. There, the policy also contained the so-called "Inchmaree" clause but,

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Accidents in loading, discharging or handling of cargo or in bunkering;
Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;
Explosions on shipboard or elsewhere;
Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);
Contact with Aircraft or with any land conveyance;
Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;
Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

as that opinion points out, the burden is still upon the assured under the circumstances presented to prove the existence of such a latent defect. Specifically, the Court there said:

> "Plaintiff contends that even if it be held that proof has not been offered to show loss from a peril of the sea, plaintiff should recover under the provision of the policy covering loss from a latent defect in the machinery or hull. It seems, though, to me, that there is the same weakness in this position as in the other one, namely, there is no proof that any latent defect in the machinery or hull caused the vessel to sink."

We therefore see that the decision of the Court of Appeals in the case at bar is in direct conflict with the views expressed in the **Watson** case, and approved by the Fourth Circuit.

Neither does the fact that the policy of insurance here being considered contained an "Inchmaree" clause distinguish the present proceedings from **Boston Ins. Co. v. Dehydrating Process Co.,** supra. The same clause was contained in that policy.* Yet that did not prevent the Court from there holding that the incursion of sea water under such circumstances raised a presumption that the vessel sank because of her unseaworthiness. In fact, as the opinion of the First Circuit states, counsel for the parties and the Court agreed that such was the law. There was not even an intimation that the mere fact that certain additional risks were added to the policy under the "Inchmaree" clause

* While this fact does not appear in the opinion of the First Circuit, an examination of the record in that case reveals it to be so.

would serve to negate the long-recognized principle that a sinking under such circumstances raises a presumption of the vessel's unseaworthiness. Again, it is abundantly clear that the opinion of the Court of Appeals in the case at bar is in direct conflict with that expressed by the First Circuit in the **Boston Ins. Co.** case.

QUESTION 2

May a Court of Appeals consider and decide a case upon issues which are not presented or tried before the District Court?

At the outset of the discussion of this point we feel that, in fairness to Respondent's counsel, we should inform this Court that the action of the Court of Appeals in considering points not raised in the pleadings or tried in the District Court is not the result of any urging by Respondent's counsel. Rather, the Court of Appeals, apparently of its own volition, saw fit to discuss and decide points which were wholly foreign to the matters presented before the District Court. An Appellate Court can no more take it upon itself to raise new issues on appeal than can a party to the cause.

In reversing the District Court, the Court of Appeals apparently concluded that it would grant to the assured a presumption that the vessel had been lost as a result of some peril insured under the "Inchmaree" clause. Yet in the trial before the District Court it was the contention of the assured that the facts presented raised a presumption that the vessel had sunk due to a "peril of the sea". The

position of the assured is clearly stated in its proposed conclusion of law Number 2, (R. 287) submitted to the trial judge.*

There was never any contention made by the assured that it claimed that the loss was caused by anything other than a peril of the sea. It is true that in its complaint the assured alleged that the loss was the result of "perils of the seas, latent defects in the machinery, and/or other perils insured against." (R-2). However, in answer to interrogatories propounded by the Petitioner (R-13) for the purpose of ascertaining the specific perils which the assured contended caused the loss, the assured merely answered that the vessel sprung a butt on its bottom under the freezer box. In these answers the assured specifically disclaimed any latent defect in machinery, and negligence of the Master was not even mentioned. (R-21).

The "Inchmaree" clause, which first raised its head in the opinion of the Court of Appeals, is nothing more than a clause adding certain enumerated risks to the policy. If the assured expects to recover for a loss because of some coverage therein contained, he certainly must contend that the loss was occasioned by such a peril when the proceedings are pending in the District Court. In the case at bar there were no such contention. Neither was there any evidence offered in an attempt to show a loss because of some "Inchmaree" peril. Indeed, the only evidence as to

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* This proposed conclusion reads:

"As the vessel was shown to be seaworthy at the inception of the risk, a presumption has been raised that the loss was by perils of the sea and the assured need not offer positive proof of the cause of the loss. If Underwriters would rebut that presumption, they must not only prove that the vessel was unseaworthy but that the unseaworthiness 'resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel'."

the cause of the leak was the testimony of the vessel's Master to the effect that the leak was characteristic of a rotten wood condition (R. 159).

The entire case was tried before the District Court by both parties upon the issue as to whether or not the Court could presume that the loss was the result of a peril of the sea. Yet the Court of Appeals holds that the "Inchmaree" clause is determinative in this case. The effect of such a ruling by an Appellate Court when no claim that the loss was caused by such perils was made in the District Court is to saddle the Petitioner with a conclusive presumption against it that the loss was caused by such a peril. Of course the Petitioner had no opportunity in the Court of Appeals to offer evidence to rebut such a presumption, if in fact there be one. How can a party be expected to offer evidence on a point that has never been put in issue before the trial court? And how can a trial judge be expected to rule that a loss is presumed to be the result of a specified peril when the plaintiff has never contended that such a peril caused the loss? As has been aptly stated, the function of an Appellate Court is, in effect, to try the trial judge -- not to try the case **de novo.**

Consider the difference between the opinion of the Court of Appeals in the present case, wherein it voluntarily introduces new grounds upon which to base its reversal, and the opinion of the Second Circuit in **G. W. Sheldon & Co. v. Hamburg-America, P.A.G.,** 287 2d 249, wherein it said:

> "The learned trial judge could not be expected to find that the Respondent had committed a deviation in the carriage of the merchandise when no

such request was made and no allegation, pleading or evidence offered to support it. This alleged error may not be considered here and made a ground for reversal."

This Court and the various Court of Appeals have repeatedly held that issues not presented before the trial court cannot be raised on appeal. The following cases are indicative of the many decided on this point:

Virtue vs. Creamery Package Mfg. Co., 227 U. S. 8, 57 L. Ed. 393, 33 S. Ct. 202

United States v. New York Telephone Co., 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393.

Walters v. City of St. Louis, 347 U. S. 231, 98 L. Ed. 660, 74 S. Ct. 505

Even a recent opinion of the Fifth Circuit is to the same effect. **U. S. v. Synor,** 238 F. 2d 271.

CONCLUSION

The ruling of the Court of Appeals in the case at bar is in direct conflict with the Courts in the other Circuits as to the presumption which arises when a vessel springs a leak in calm waters. In reaching its conclusion, the Court of Appeals considered and relied upon issues not presented or tried before the District Court. For these reasons we respectfully urge that a Writ of Certiorari be granted in this cause.

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16071

TROPICAL MARINE PRODUCTS, INC.,
Appellant,

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.
(August 13, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: This appeal by the shipowner tests the correctness of the adverse judgment of the District Court after a trial without a jury denying recovery under an American Institute Time Hull Policy for a sinking from unknown causes. So uncontradicted are the facts, as found or as controlling, that the District Judge's findings of fact were an almost verbatim adoption of those proposed by the plaintiff Shipowner, the losing party. The case turned finally in the Judge's analysis upon successive presumptions.

Except for a few editorial changes involving no matter of substance, ours is a direct recital, with an occasional paraphrase, of the Judge's findings.

The policy was for the period August 14, 1953 to August 14, 1954. The vessel was valued at $30,000. The **Sea Pak** was a wooden hull vessel originally built for the United States Coast Guard. She was 71'7" long, 13'6" wide and drew 4'6" of water. In the summer of 1953, she had been overhauled[1] in Miami and in August 1953 was in good condition and seaworthy. She left Miami in August 1953 and was operated from that time until her loss in and around Caicos Islands in the Bahamas. She had not been hauled out of the water subsequent to August 1953, although she had been placed in shallow water and her bottom scrubbed on several occasions while she remained afloat.

The **Sea Pak** left Cockburn Harbour, South Caicos Islands, on August 9, 1954. It proceeded to a fishing anchorage in the lee of Long Key.[2] This was a distance of about eight miles. The fishing anchorage was protected from the prevailing winds and from the sea and the water, and the anchorage remained calm all the time the **Sea Pak** was anchored there. The vessel remained at anchor in about 15

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1 She was rebuilt in Miami under the immediate supervision of the underwriter's surveyor who unqualifiedly recommended her for insurance for the annual term and without any recommendations or requirements for drydocking, bottom inspection, repainting or the like. The surveyor testified:

"The hull was checked. A lot of new planks were put in the ship. The caulking was recaulked. * * * Her stuffing boxes were checked and repacked. The vessel was completely overhauled to my satisfaction."

Her intended trade was known and the policy expressly stated:

"NAVIGATION LIMITS: Warrented confined to inland and coastal waters of the Bahamas, with occasional trips to the Florida East Coast for repairs."

feet of water in this protected area until approximately 5:00 a.m. on August 13. During this time the vessel was collecting conch from small skiffs that were fishing in that area.

At about noon on August 12, the Master noticed that the **Sea Pak** was beginning to take on an unusual amount of water and that the automatic pump was working more than normally necessary. During that afternoon and night the leaking became progressively worse. An inspection of the vessel revealed that the water was coming from underneath a refrigerated space in the forward part of the ship. Because of the construction of the interior of the vessel, the bilge underneath this area was inaccessible. Shortly before daylight on August 13, the Master felt that the leak had developed to such an extent that he should attempt to return to Cockburn Harbour.

As soon as it way daylight, or about 5:00 a.m., on Friday the 13th, the anchor was raised and the boat proceeded around the south end of Long Key into the open waters of Turks Island Passage in an effort to return to Cockburn Harbour. At this time, the sea on the wind-ward side of Long Key was choppy and there was a moderate breeze. These conditions were not unusual for that area and were not such as would ordinarily have caused the vessel any difficulty.

After the vessel got underway, the leak continued to get progressively worse and before the ship could reach

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2 Because of intervening sand and coral shoals between the fishing ground and Cockburn Harbour, the vessel had to go outside into the Atlantic Ocean and coast well off the seaward side of Long Key, a coral key about five miles long rising precipitously from the water to a height of fifty feet or so and exposed to seas which occasionally broke over the top of these high rocky cliffs.

Cockburn Harbour, the leak had progressed to such an extent that the vessel's engine was drowned out. The vessel then drifted back along the shoreline of Long Key until the Master ordered the crew to abandon her. The four men on board then rowed ashore in a 14' rowboat which was being towed astern of the **Sea Pak** and the **Sea Pak** eventually sank outside the 100 fathom curve. Because of the depth of the water, no salvage attempt was made.

The Court concluded, as both plaintiff and defendant urged and as the physical loss which destroyed all evidence required, that "there is no explanation as to what caused the leak which resulted in the loss of the vessel."

Proceeding apparently then from an implied application which was not spelled out of a presumption[3] of unseaworthiness because the vessel developed a leak in these calm waters in the lee of Long Key, the Court held as a legal conclusion that in the face of this presumption, there was not a counter presumption[4] that the loss came within the perils covered by the policy. The Shipowner contended that even though the **sinking** of the vessel in calm protected waters might give rise to an inference of unseaworthiness, proof of seaworthiness, here admitted, as of the inception of the risk, was sufficient upon which the usual presumption[5] would operate that, in the absence of a showing that it occurred from an excepted peril, the loss was caused by a peril insured against.

The Underwriter argues that, accepting these cases urged by the Shipowner, the counter presumption that the

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3 Paddock v. Franklin Fire Ins. Co., 17 Pick. (Mass.) 227; Swift v. Union Mutual Ins. Co., 122 Mass. 573; Watson v. Providence Washington Ins. Co., D.C.N.C. 106 F. Supp 244, 1952 AMC 1812 appeal dismissed, 4 Cir., 201 F. 2d 736, 1953 AMC 337.

loss was from an insured peril, does not arise unless the owner proves that immediately before the loss the vessel was in a seaworthy condition. On this it emphasizes that the Court held as a fact that the Shipowner had not shown that the vessel was seaworthy immediately prior to the developing of the leak.

But we think that the difficulty with this decision stems from the fact that, like the underwriter, the Court assumed that the policy only insured "* * * the vessel against loss from extraordinary occurrences and does not insure her against those ordinary perils which vessels must encounter * * *." In the quaint language which persists in this ancient policy form, the **Portmar, Calmar Steamship Corp. v. Scott,** 345 U. S. 427, 97 L. Ed. 1125, 1953 AMC 952, with its "Pirates, Rovers, Assailing Thieves * * * and Detainments of * * * Princes * * *," the Court's opinion makes it plain that all he thought involved was the initial insuring clause which he quoted:

> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea,

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4 The Court cited: Watson v. Providence Washington Ins. Co., 106 F. Supp. 244 (opinion approved 201 F. 2d 736); Klein v. Globe & Rutgers Fire Ins. Co., 2 F. 2d 137; Jahn v. Steamship Folmina, 212 U. S. 264; Long Dock Mills & Elevator Co. v. Manheim Ins. Co., 116 Fed. 886; Swift v. Union Mutual Insurance Co., 122 Mass. 573.

5 The Shipowner relies principally upon: Mattson v. Connecticut Fire Ins. Co. of Hartford, D.C. Minn., 80 F. Supp. 101; Boston Insurance Company v. Dehydrating Process Co., 1 Cir., 204 F 2d 441, 1953 AMC 1364; Land v. Franklin National Ins. Co. (So. Car.), 225 S. C. 33, 80 S. E. 2d 420; Glens Falls Ins. Co. v. Long, 195 Va. 177, 77 S. E. 2d 457, 1953 AMC 1841.

> Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel & c. or any part thereof."

This was to overlook a substantial insurance undertaking which, history shows, **The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc.,** 5 Cir., 242 F. 2d 385, 1957 AMC 655; **Ferrante v. Detroit Fire and Marine Insurance Company,** D. C. Calif., 125 F. Supp. 621, 1954 AMC 2026, was added voluntarily by underwriters, (with successive amendments to meet like conditions) to expand protection to shipowners and thereby overcome court decisions favorable to an underwriter but which, the underwriting fraternity thought unrealistic and a denial of coverage reasonably needed. Personified by the name of the vessel giving rise to the decision, The Inchmaree clause, with almost ritualistic uniformity provides generally, and here, specifically:

> "This insurance also specially to cover * * * loss of or damage * * * directly caused by the following:—
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> * * *
>
> "Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any

latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

* * *

"Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;

"Provided such loss or damage has not resulted from want of due diligence by the Assured, the owners or Managers of the Vessel, or any of them. * * *"

This affords both an additional series of perils insured against and markedly affects the warranties of seaworthiness between Shipowner and Underwriter.

The Court here apparently labored, as did so many so long under some sort of notion that the owner owed the duty to keep and maintain the vessel in seaworthy condition and consequently, to recover, the owner must establish this as a fact. Indeed, the point of departure[6] between the plaintiff's proposed and the Court's findings adopted was over the seaworthiness[7] of the vessel immediately prior to the loss.

But as we, The **Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra,** and the Second

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6 On the specific issue of the *cause* of the loss, there is no real difference. The court found:

"7. There is no explanation as to what caused the leak which resulted in the loss of the vessel."

Whereas the plaintiff Shipowner proposed this finding:

"10. The precise cause and nature of the leak remained unknown."

Circuit, **New York, New Haven and Hartford R. Co. v. Gray,** 2 Cir., 240 F. 2d 460, 1957 AMC 616, cert. den. . . . . U. S. . . . ., 1 L. Ed. 2d 915, by almost simultaneous decisions have recently pointed out, the owner's obligation under a Time Policy, as was this one, is extremely limited: the vessel is seaworthy at the attachment of the insurance, but henceforth it is a sort of negative warranty, i.e., the owner or those in privity with him will not knowingly send the vessel to sea in a deficient condition.

Here the most that was determined as to unseaworthiness of the MV **Sea Pak** was the Court's negative finding that the owner had not sustained its burden of proving seaworthiness. This is far from the opposite holding that the vessel was **un**seaworthy. On that the Court did not make such a finding and perhaps for the reason that, on the record before him, it was doubtful that there was sufficient proof.[8] There was evidence that two fishermen

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[7] The Court found:
"8. The Plaintiff has not shown that the vessel was seaworthy immediately prior to the developing of the leak which resulted in the loss of the vessel."
The plaintiff Shipowner proposed the exact opposite:
"11. Defendants have not shown that the vessel was unseaworthy immediately prior to her last voyage nor has there been any showing of want of due diligence on the part of the assured and owners of the Sea Pak to make her so."

[8] To be sure the Underwriter offered as impeachment the statements of two native crewmembers, a 17-year-old Engineer and the Cook who could "write but not read" and who claimed he was intoxicated as well. These statements were given after each was escorted by a local policeman and taken before the British Commissioner of South Caicos as he sat on his dais flanked by the Underwriter's American lawyer and an investigator surveyor. These statements, sharply contradicting their deposition evidence that the vessel had had no appreciable leaks, stated that the *Sea Pak* during the six weeks prior to her sinking had leaked extensively. The Underwriter's brief asserts "the trial judge was certainly free to give the statement such weight as he saw fit." Of course, that is true as to destroying the credibility of these witnesses to prove seaworthiness. But the prior inconsistent statements were the only word testimony of unusual abnormal leaks, and they were not admissible to prove that *fact*. 58 Am. Jur., Witnesses, §770.

skindivers (not ship repairmen) made an underwater inspection a month or so before and drove in a few wooden plugs, but whether in blanked off auxiliary openings or elsewhere was extremely vague. One diver, who asserted that the bottom "was all right," also said that "there was no paint on it, no paint that you would call paint." But except for the prior inconsistent statements of the two crew members, note 8, **supra,** the evidence was uncontradicted from the current master and his immediate predecessor (who had left the vessel two weeks before her sinking for a vacation) that there were only the usual leaks one expects in a wooden hull vessel. The equivocal[9] evidence of the underwater activity of the skindivers was a circumstance which, with other evidence, could be used in drawing the competing inferences that, on the one hand, this showed careful, prudent diligence in the maintenance of the vessel or, on the other hand, the existence of an unseaworthy condition. But standing alone, it was insufficient to prove unseaworthiness and the remainder of the record would not overcome this deficiency.

The only thing of substance, pressed so hard and successfully by the Underwriter on the Court, was a presumption, note 3, **supra,** not evidence, that when a vessel **sinks** in a calm protected harbour the cause, unless otherwise satisfactorily explained, must have been unseaworthiness.

But even though it is assumed that this rule would apply when the leak develops while the vessel is at sea

[9] The Underwriter's surveyor as an expert testified:
"The Court: The question is whether an adequate inspection could be made by divers while the ship is in the water?
"The Witness: In my opinion, no, sir."

and after it has left port, the Court attributed unwarranted consequences to it. On the findings, the leak developed **after** the vessel had been out three and one-half days. If it is assumed **arguendo** that when the **Sea Pak** left Cockburn Harbour on August 9, she was in an unseaworthy condition, there is absolutely none that the Shipowner or anyone in privity with it know of that. There was thus no breach of the limited warranty of seaworthiness nor of the insurance and it was effective. **The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra.** When as the Court found, the unseaworthy condition (leak) developed, after the vessel was at sea and there were then no means by which to remedy it, what happens to the insurance? Does it terminate at the very moment it is needed most? Cf. **Henjes v. Aetna Insurance Company,** 2 Cir., 132 F. 2d 715, 143 AMC 27, cert. den. 319 U. S. 76, 87 L. Ed. 1711.

Indeed, far from voiding the policy, it was as to just such unseaworthiness that the policy was meant to apply. The Inchmaree clause insures against damage or loss occasioned by latent **defects** in machinery or hull. Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull, cannot comply with the classic definition of "reasonably suitable" for the purposes intended. The Silvia, 171 U. S. 462, 43 L. Ed.. 241; **Compania de Navegacion v. Fireman's Fund Insurance Co.,** 277 U. S. 66, 72 L. Ed. 787. The only limitation on this is that the defect be latent and one not known or discoverable by the owner or one in privy with him. This is so because, as we held in **Spot Pack Saskatchewan Government Insurance Office v.**

Spot Pack, Inc., supra, the phrase "Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners, or Managers of the Vessel" does not include acts of the master or crew members merely imputed on notions of **respondeat superior.**

Here, of course, the owner was in the United States and on this record all was left to the master. There is no evidence that the nonresident owner had personal knowledge of this condition, whatever existed, or the necessity for any detailed drydocking, bottom inspection, scraping or repainting. The policy, as is so often the case, did not prescribe any requirement for drydocking or a routine period for drydocking. That there might have been testimony that the bottom paint was gone, and one surveyor faintly suggested that he thought the vessel should have been hauled out every six months or so to avoid action by wood-destroying worms (an opinion expressed without knowledge of the practice following in the Caicos Islands where the evidence indicated an absence of such wood borers) was not of that caliber essential to a holding that the Shipowner personally failed to take prudent steps.

The defect was certainly latent in a practical sense. The Court found that there is "no explanation as to what caused the leak." And all are unanimous that it was and could not be determined. As the leak was increasing, the master and engineer determined that it had to be coming from that part of the hull in way of the freezer compartment. There was positively no means of checking the inside of the hull in this space and, of course, lying at

anchor eight miles from port, there were no facilities established for a worthwhile inspection or repair over the side.

Since cases should be decided on practicalities and not theoreticals, the fact that this record stands uncontradicted that the hull did not leak in this way, at this place, or in this quantity prior to departure from port August 9, or on any one of the intervening days up to the afternoon of August 12, demonstrates also that if, as some theorize, a butt (the joinder of the ends of two of the hull planks) sprung to permit the leak, there is no[10] basis for concluding that the defect could then have been discovered.

And if the matter is approached from the viewpoint that the Shipowner, without the benefit of any presumptions, must affirmatively establish that the particular defect was latent within the classic[11] meaning of the term, the

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10 The Underwriter's expert testified:

"Q. What would cause a butt to spring?

"A. A poor fastening.

"Q. What?

"A. A poor fastening, or the wood is soft around the fastening."

He did not, of course, undertake to say that such poor fastening would have been discoverable. In any event, his testimony was uncontradicted that at least one plausible cause might not show up (be discoverable) for some time:

"Q. She might have strained a butt in the seaway at some previous date, which showed up later?

"A. That could happen."

11 "A latent defect is one that could not be discovered by any known and customary test." The West Kyska, Waterman S.S. Corp. v. United States Smelting Refining & Mining Co., 5 Cir., 155 F. 2d 687 at 691, 1946 AMC 997 at 1003, cert. den. 329 U. S. 761, 91 L. Ed. 656, and "* * * is a hidden defect and generally involves the material out of which the thing is constructed as distinguished from the results of wear and tear." Ferrante v. Detroit Fire and Marine Insurance Co., D. C. Calif., 125 F. Supp. 621 at 624, 1954 AMC 2026 at 2030. It is "A hidden defect * * * not manifest, but hidden or concealed, and not visible or apparent; a defect hidden from knowledge as well as from sight; * * * a defect which reasonably careful inspection will not reveal; one which could not have been discovered by inspection * * * by any known and customary test." 26A CJS, Defect., p. 133. Mellon v. Federal Ins. Co., D. C. N. Y., 14 F 2d 997; The Bill, C C. Md., 47 F. Supp 969, 1942 AMC 1607, affirmed Lorentzen v. Brazil Oiticica, Inc., 4 Cir. 145 F. 2d 470, 1945 AMC 108.

result is the same. Since the Underwriter's assertion of unseaworthiness is a claim that the hull was defective, it was either latent or not latent. If it was not discoverable prior to departure for sea by all known and customary tests, it was latent and covered under the policy. If, on the other hand, it is claimed that the proof showed that it was discoverable by prudent inspections, or that the proof failed to show that prudent inspection could not have revealed it, the result is that the defect was one which in prudence ought to have been discovered. On this hypothesis, it was the Master who should have discovered it. If the Master knew of the leak or the conditions likely to give rise to leaks, or if the Master, not knowing that, knew enough that he ought to have discovered this condition, it was his clear duty to his Shipowner to do all that prudence required to ascertain and correct such conditions. The record is uncontradicted that the Master was responsible for the current upkeep, maintenance and repair of the vessel while she was in the Islands, and the Shipowner had approved all of his maintenance requirements. The Master's failure in carrying out his duty to his Shipowner was negligence and, under the Inchmaree clause, this too was specifically covered.

If the defect could have been discovered the resulting unseaworthiness was due to the Master's negligence; if it was not discoverable by him or Shipowner, it was latent. Either way the Underwriter turns, the loss is within his expanded coverage.

To be remembered also is the fact that this vessel did not sink in a calm sea or in the harbour-like protection of the lee of Long Key. A leak developed there, and the leak

became increasingly worse. But the sinking of the ship was the direct action of substantial seas with wind abeam, while running off the exposed percipitous coast of Long Key in the effort to make the port of haven. It was undisputed that with the butt sprung, the action of the vessel being pushed ahead by her own power, working against the seas, would open up the planks even further. While it is true that these seas were not tempestuous, it is just as true that it was the cruel sea working on a troubled hull which changed a possible sinking in fifteen feet of water at the fishing anchorage into an inevitable total loss as she sunk to the watery grave outside the 100 fathom curve.

When the leak was discovered the vessel, as we said above, still had insurance. Likewise, there was no duty owed the Underwriter not to attempt to make a port of haven. Negligence of the assured or his agent is no defense to a marine policy, **New York, New Haven and Hartford R. Co. v. Gray, supra,** at 464; **Orient Mutual Insurance Co. v. Adams,** 123 U. S. 67, 31 L. Ed. 63; **Columbia Insurance Company of Alexandria v. Lawrence,** 35 U. S. 507, 9 L. Ed. 512; **Waters v. Merchants Louisville Insurance Company,** 11 Pet. 213, 36 U. S. 213, 9 L. Ed. 691; **Patapsco Insurance Co. v. Coulter,** 3 Pet. 222, 28 U. S. 222, 7 L. Ed. 659. And if it is assumed that to attempt the voyage in the exposed sea with the vessel in this weakened condition was a negligent act, it inevitably was negligence of the master then in sole command who alone determined whether to attempt the perilous run for sanctuary rather than risk sinking in fifteen feet of water, or pressing her bow onto the sand shoals. But there again, the more palpable was the master's negligent choice of these alterna-

tives, the more categorical it makes the Inchmaree liability for "negligence of master."

We cannot emphasize too strongly that, as was the purpose of the underwriters in making the change, the Inchmaree clause is an expansion of coverage of considerable magnitude. Unlike so many cases, **Union Insurance Company of Philadelphia v. Smith,** 124 U. S. 405, 31 L. Ed. 497; **Continental Insurance Company of City of New York v. Patton-Tully Transportation Company,** 5 Cir., 212 F. 2d 543, 1954 AMC 889; **Ideal Cement Co. v. Home Insurance Company,** 5 Cir., 210 F. 2d 937, 1954 AMC 663; **Hanover Fire Insurance Co. v. Holcombe,** 5 Cir. 223 F. 2d 844, 1955 AMC 1531, cert. den. 350 U. S. 895, 100 L. Ed. 787, where each policy contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness, a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree clause does in fact underwrite unseaworthiness of many types.

If a vessel has become unseaworthy due to the negligence of master or engineer in the maintenance of the vessel, in putting to sea without adequate equipment, fuel or stores, or without making required repairs at outports wheer the master is the sole principal representative of the owners, the "cause" is negligence and this is expressly underwritten. If there is an undiscoverable defect in hull or machinery, the resulting unseaworthiness or the damage caused by it[12] is nonetheless covered.

[12] Add to this the endless possibilities for other specific Inchmaree coverages not quoted in the excerpt above: "Accidents in loading, discharging or handling cargo, or in bunkering," e.g., damage to hull from use of unseaworthy winch, booms or cargo gear; damage to vessel during loading or discharging operations resulting from the unseaworthiness brought about by such opera-

Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for nonpayment—a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause.

The judgment denying recovery is therefore reversed and here rendered for the plaintiff Shipowner.

REVERSED AND RENDERED.

tions, e.g., listing, faulty trim, overloading. "Explosions on shipboard or elsewhere," e.g., from accumulations of gases from unseaworthy valves or tanks, malfunctioning of pressure relief valves on air tanks, manifold headers, etc. "Breakdown of motor generators or other electrical machinery and electrical connections thereto," e.g., collision damage from failure of unseaworthy electrical steering engine.

APPENDIX "B"

JUDGMENT.

Extract from the Minutes of August 13, 1957.

TROPICAL MARINE PRODUCTS, INC.

No. 16071

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court denying recovery in this cause be, and the same is hereby, reversed and here rendered for the plaintiff, Tropical Marine Products, Inc.;

It is further ordered and adjudged that the appellee, Birmingham Fire Insurance Company of Pennsylvania, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

ORDER OF THE COURT OF APPEALS

DENYING REHEARING

Extract from the Minutes of September 11, 1957.

TROPICAL MARINE PRODUCTS, INC.

No. 16071 versus

BIRMINGHAM FIRE INSURANCE COMPANY
OF PENNSYLVANIA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Office - Supreme Court, U.S.
FILED
NOV 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 570

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,

Petitioner,

vs.

TROPICAL MARINE PRODUCTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILBUR E. DOW, JR.,
70 Pine Street,
New York 5, New York.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court for the Southern District of Florida is not officially reported but is printed at page 47 of the appendix submitted to the Court of Appeals. The opinion of the Court of Appeals for the Fifth Circuit is reported at 247 F. 2d 116.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1957. A petition for rehearing was denied on September 11, 1957. The petition for a writ of *certiorari* was filed on October 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1245(1) and 2101(c).

Questions Presented

Whether recovery should be denied to an assured on a policy of Marine Hull Insurance where an insured vessel, proven to be seaworthy within the meaning of the policy, was lost in ordinary weather from an unexplained cause.

Whether the failure of a trial court to consider all of the issues presented to it can prevent an appellate court from doing so.

Statutes Involved

This case does not turn upon the construction of any statute, rule or regulation of the United States.

Statement*

The M/V Sea Pak, owned by Respondent, was a wooden hulled vessel of approximately 71 feet in length which sank on August 13, 1954 in the waters of South Caicos Island, British West Indies. At the time of loss, the vessel was insured for $30,000 for a one year period by Petitioner on an American Institute Time-Hulls form policy. The Petitioner refused to pay the loss and this action was commenced.

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* References to the testimony contained in the Appendix submitted by Plaintiff-Appellant below are indicated by Pl. A. followed by the page number.

The vessel was constructed for the United States Coast Guard and purchased by T. A. Barba as a fishing boat in 1953 and subsequently sold to the Respondent. Following purchase by Barba the ship was practically rebuilt with the decks renewed, new frames installed, cypress planking renewed where required by Petitioner's surveyor, and fastenings which hold the hull planking to the frames completely removed and renewed. The vessel also was recaulked, sandblasted and painted. Refrigerating and chilling equipment and crew quarters were installed and the pilot house and bridge were remodeled.

An employee of the owner was in charge of the reconstruction of the vessel (Pl. A. 100). Supervisor of the reconstruction on behalf of the Petitioner was James P. Stuart, a qualified marine surveyor (Pl. A. 66, 73). A preliminary report and final survey were submitted by Stuart to his principals on July 31, 1954 (Pl. A. 37), and August 11, 1953 respectively (Pl. A. 77). These reports and the testimony of the Petitioner's surveyor indicate that the reconstruction and overhaul was accomplished to his complete satisfaction and he estimated the replacement value of the vessel at twice the amount for which it was insured, namely $60,000 (Pl. A. 77). The vessel was also thoroughly inspected by the United States Coast Guard at this time and found to be in proper order (Pl. A. 100).

Following receipt of the reports from its surveyor, Petitioner issued a time hull policy, number 26132, on the SEA PAK, in the amount of $30,000 with risk commencing at noon on August 14, 1953 and extending to noon on August 14, 1954 at a premium of 6½% totaling $1,950. From the date of issuance until the time of loss, the vessel underwent no further formal inspections by Petitioner since none was required under the policy (Pl. A. 75). There was no requirement that the boat be hauled for inspection or drydocked for repairs (Pl. A. 236, 244).

The intended employment of the vessel was to fish and to collect fish and sea food from native fisherman in the Turks and Caicos Islands. On board the catch would be washed, chilled, cleaned, wrapped, quick-frozen and stored in the freezer compartment until discharged at Cockburn Harbor and flown to Miami (Pl. A. 94). This was known to Petitioner and written into the policy as a navigational warranty:

> "Warranted confined to inland and coastal waters of the Bahamas, with occasional trips to the Florida East Coast for repairs."

Upon completion of reconstruction, inspections and issuance of the policy of insurance, the SEA PAK proceeded to the Turks and Caicos Islands where it operated continuously until its loss. During this period there was only ordinary sea water seepage commensurate with wooden hulled vessels and normal seepage through stuffing boxes (Pl A. 101). There was also the ordinary wear and tear to be expected in the trade for which it was insured (Pl. A. 119, 130). While at Caicos the boat was inspected periodically by Captain Berlinski and his crew and growth was scraped from the bottom (Pl. A. 104). Requests to the owner for repair parts were promptly filled (Pl. A. 95, 103). On at least one occasion, within less than three months before the loss, two American divers made an under water inspection of the hull and reported it to be sound (Pl. A. 105, 121, 127).

On about August 9, 1954, the vessel left the plant at Cockburn Harbor under the command of Captain Joseph F. Moran, the company relief captain, an able ship handler, who relieved the regular captain who was on vacation (Pl. A. 134). The vessel had been ordered to bring in about six tons of conch and to do this, operations went forward in one spot until no more conch was available and the boat moved on to the next area. Eventually the

SEA PAK worked itself around to the other side of the island in a relatively protected anchorage in the lee of Long Key where it anchored while receiving conch from the native fishermen using small boats (Pl. A. 142).

About noon of August 12, 1954 the master noticed that the automatic bilge pump was operating more than normally necessary. He checked the bilges but the pump had removed the water. The pump continued to operate at frequent intervals during the afternoon and the Captain made a thorough inspection inside the vessel to determine the source of water. He found some seepage in the bilges at the forward bulkhead separating the engine room and the refrigerated space, however, in the bow beyond the forward reefers there was no indication of any leaking (Pl. A. 141). The bilge beneath the forward refrigerator space was inaccessible because of the interior construction of the vessel.

During the evening the Captain and the engineer again inspected the vessel but still could not determine the source of the water (Pl. A. 142). When the flow continued to increase the Captain decided to return to Cockburn Harbor but because of the unlighted reefs in the area he was unable to get underway until 5 o'clock on the morning of August 13, 1954. As the sun came up, the wind rose and there was some sea running but not of sufficient force to bother the vessel under ordinary circumstances.

As the vessel got underway the flow of water became progressively worse and the Captain had the crew jettison approximately six thousand pounds of fish (Pl. A. 142). During this time the automatic bilge pump was in continual operation and the pump used to wash fish, as well as the two inch hand pump, were constantly operating (Pl. A. 143, 145). The decreased weight of the vessel helped for a short period of time, but the water continued to gain. At approximately two and one half miles from

the plant and about one mile from the harbor entrance, one engine and then the other stopped as water reached the ignition systems. The vessel began to drift and the Captain ordered the anchor dropped with maximum chain of approximately 300 feet. The vessel continued to drift out to sea and both the sea and the wind increased in intensity. Realizing that he could not get the vessel into shore without assistance, the Captain ordered the crew into a dinghy which was towed astern the SEA PAK (Pl. A. 146). The crew and the Captain rowed toward shore and were taken up by a LCVP which was used by the company as a runabout, after that boat had circled the SEA PAK in an attempt to assist (Pl. A. 146). Upon picking up the crew the runabout was sent to the shore plant in an attempt to secure a large gasoline driven pump. As it began the return trip with the pump, the SEA PAK sank.

The captain did not and could not know the cause of the sinking. As an experienced seaman he could only conjecture, from the increased intake when underway, that a butt had sprung and acted as a scoop taking water into the hull (Pl. A. 159). Since the SEA PAK had sunk in approximately 200 fathoms of water, salvage operations were impossible and no confirmation of the captain's theory of the loss was obtainable.

Argument

1. The Petitioner contends that when a vessel sinks under the circumstances of the loss of the SEA PAK, the vessel owner must prove that the vessel was seaworthy immediately prior to springing the leak in order to recover on a policy of hull insurance. Petitioner further contends that the owner has failed to prove such condition and recovery should be denied. The record, policy contract and prior judicial decisions fail to support either contention.

Respondent submits that under American law there is an implied warranty of seaworthiness at the commencement of the term of time-hull insurance policy. This warranty continues throughout the term only to the extent that the vessel owner must exercise due diligence to maintain the vessel in a seaworthy state. *Union Insurance Company of Philadelphia* v. *Smith*, 124 U. S. 405. The initial excellent condition of the SEA PAK was determined by Petitioner's surveyor and was not contested. Proper maintenance of the vessel during the term of insurance was amply explored and supported in testimony of the owner and crew members. Petitioner was unable to offer any evidence of failure by Respondent to exercise due diligence or take any action which might have been taken by a prudent uninsured owner. Respondent submits that the presumption of seaworthiness became operative and was not rebutted by the sudden entry of water, the cause of which at that point could not be accurately ascertained. To require Respondent, *after the event*, to show actual seaworthiness immediately prior to the unexplained entry of water is to deprive the Respondent, as stated by the Court of Appeals, of the protection of his insurance at the time when he needed it most.

Petitioner places unwarranted reliance upon a claimed conflict in the decisions rendered by the various Courts of Appeal. The First Circuit allowed recovery by the vessel owner in *Boston Ins. Co.* v. *Dehydrating Process Co.*, 204 F. 2d 441, on a finding that the vessel was seaworthy in accordance with the insurance contract requirements and that loss could only have resulted from an insured peril. The exact cause of the sinking, as here, was never ascertained.

The Second Circuit found that damage done by the fortuitous action of the sea was an insured peril of the sea and allowed recovery under a policy of marine insurance even after an insured shipowner had been found by the trial court to be grossly negligent in failing to pre-

serve the insured property. *New York, New Haven & Hartford R. Co.* v. *Gray*, 240 F. 2d, 460, *cert. den.*, 353 U. S. 966.

In *Klein* v. *Globe & Rutgers Fire Ins. Co.*, 2 F. 2d, 137, the Third Circuit found that a riverboat sank as the result of an insured peril of the sea and allowed the owner to recover the provable loss although refusing to allow a constructive total loss.

The Fourth Circuit apparently has not yet decided this question since review was impossible due to a procedural defect in *Watson* v. *Providence Washington Ins. Co.*, 201 F. 2d, 736, and any opinion expressed by that forum can only constitute dicta.

In arriving at its decision in the present litigation the Fifth Circuit demonstrated complete consistency with the earlier opinion expressed in *Saskatchewan Government Insurance Office* v. *Spot Pack, Inc.*, 242 F. 2d, 385.

It is abundantly clear that no real conflict exists in the present state of law governing policy contracts of the type issued by Petitioner.

2. The Petitioner contends that the Court of Appeals erred in arriving at a different conclusion from that reached by the trial court and that the conclusion reached could only be made by consideration of issues not before the trial court. Respondent submits that the Court of Appeals acted properly in considering the entire record of litigation and that the necessity to do so arose solely from the failure of the trial court to look to the pleadings, evidence and testimony before it.

As in many marine casualties, the Respondent, as owner of the SEA PAK, was and is unable to determine the exact cause of the sinking of its vessel. This lack of knowledge made it necessary for the Respondent to plead generally the entire policy of insurance in its complaint and specifi-

cally the enumerated risks which were insured. Since no decisive evidence could be adduced at trial, by either Petitioner or Respondent, as to the actual cause of loss, all factors which could in any way assist the court in determining the question were placed in evidence or given in testimony. Trial memoranda submitted by the Respondent clearly spelled out the various risks under which recovery might be had in the suit on the policy of insurance. The trial court chose to ignore all of the insured risks but one, perils of the seas. This choice cannot circumscribe inquiry by an appellate court into all matters properly presented to the lower court.

Respondent further submits that the judicial decisions relied upon by Petitioner have no application to the action of the Court of Appeals. That court reversed the finding of the lower court on the very risk to which the lower court restricted its inquiry. In addition, the Court of Appeals found that even if the Respondent could not have recovered under perils of the seas it could avail itself of the alternative risks clearly written into the insurance contract and thus effect recovery. This expansion from the narrow finding of the lower court could scarcely be considered a trial *de novo*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Wilbur E. Dow, Jr.,
Attorney for Respondent.